(16,229, 16,230, 16,231.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 469.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

No. 470.

THE ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

No. 471.

THE UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF INDIANA.

IN ERROR TO THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA.

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1 [On the margin:] Feb'y 3, 1896. Rec'd of def't, Adams Express Co., $70.00 in pay't — cost of transcript. James W. Fesler, cl'k.

Be it remembered that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, &c., in the circuit court of the county of Marion, State of Indiana, are the following in the cause of—

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS COMPANY. } No. 7284.

And be it also remembered that heretofore, to wit, on the 7th day of May, A. D. 1894, the above-named plaintiff, by its attorneys, filed in the office of the clerk of the said Marion circuit court its complaint against the aforesaid defendant in the words and figures following:

2 STATE OF INDIANA, *Marion County,* } *ss:*

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS COMPANY. } No. 7284. Circuit Court. Complaint, &c.

The State of Indiana, plaintiff, complains of The American Express Company, a corporation organized and existing under and by virtue of the laws of the State of ——, defendant, and says that for a long time prior to the first day of April, 1893, and ever since continuously, the defendant has been engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof money, packages, gold, silver, plate, merchandise, freight, and other articles under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true intent and meaning of the statute in such cases made and provided, an express company; that on and subsequent to the first day of April, 1894, such proceedings were had before the State board of tax commissioners of the State of Indiana, the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Adams, Blackford, Brown, Cass, Crawford, Daviess, De Kalb, Dubois, Fulton, Gibson, Harrison, Howard, Huntington, Jackson, Jay, Jefferson, Lagrange, Martin, Miami, Noble, Ohio, Perry, Pike, Scott, Spencer, Steuben, Sullivan, Switzerland, Tipton, Union, Warrick, and Whitley, within the limits of which counties, thirty-two in number, said defendant owned no property subject to taxation, and before the various township and county assessors in the various townships, that there *was* assessed against said defendant for the year 1893

taxes in the several counties in the respective amounts named below—that is to say:

In the county of Allen the sum of		$82 45
" " Bartholomew the sum of		49 78
In the county of Benton the sum of		144 87
In the county of Boone the sum of		105 04
In the county of Carroll the sum of		106 60
In the county of Clark the sum of		53 83
In the county of Clay the sum of		76 81
3 In the county of Clinton the sum of		181 05
In the county of Dearborn the sum of		175 81
In the county of Decatur the sum of		208 85
In the county of Delaware the sum of		81 81
In the county of Elkhart the sum of		86 53
In the county of Fayette the sum of		53 27
In the county of Floyd the sum of		35 82
In the county of Fountain the sum of		176 33
In the county of Franklin the sum of		114 35
In the county of Grant the sum of		164 53
In the county of Greene the sum of		73 35
In the county of Hamilton the sum of		61 87
In the county of Hancock the sum of		102 20
In the county of Hendricks the sum of		170 94
In the county of Henry the sum of		129 33
In the county of Jasper the sum of		152 50
In the county of Jennings the sum of		32 54
In the county of Johnson the sum of		71 92
In the county of Knox the sum of		32 24
In the county of Kosciusko the sum of		89 60
In the county of Lake the sum of		231 17
In the county of La Porte the sum of		319 61
In the county of Lawrence the sum of		156 90
In the county of Madison the sum of		187 12
In the county of Marion the sum of		288 50
In the county of Marshall the sum of		75 89
In the county of Monroe the sum of		97 39
In the county of Montgomery the sum of		112 80
In the county of Morgan the sum of		49 79
In the county of Newton the sum of		150 34
In the county of Orange the sum of		104 93
In the county of Owen the sum of		39 50
In the county of Parke the sum of		180 39
In the county of Porter the sum of		132 05
In the county of Posey the sum of		68 72
In the county of Pulaski the sum of		89 54
In the county of Putnam the sum of		183 43
In the county of Randolph the sum of		158 54
In the county of Ripley the sum of		23 90
4 In the county of Rush the sum of		93 44
In the county of Shelby the sum of		104 84

In the county of Starke the sum of	$24 00
In the county of St. Joseph the sum of	22 30
In the county of Tippecanoe the sum of	279 93
In the county of Vanderburgh the sum of	56 07
In the county of Vermillion the sum of	133 85
In the county of Vigo the sum of	120 65
In the county of Wabash the sum of	104 54
In the county of Warren the sum of	100 35
In the county of Washington the sum of	89 88
In the county of Wayne the sum of	47 97
In the county of Wells the sum of	54 66
In the county of White the sum of	138 70
The total taxes so assessed against the defendant in the several counties of the State amounting in the aggregate to	$6,837 91

That thereafter and subsequent to the levying and assessment of said taxes in the said several counties within the State the same were, in their respective counties, by the several auditors thereof, duly extended upon the proper tax duplicates, and the duplicates, with the taxes so extended, delivered by the respective auditors of said several counties on or about the first day of January, 1894, to the several treasurers of such counties for proceedings thereon as required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the third Monday in April, 1894, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said several counties the amount so respectively levied and assessed against it for the State, county, and other purposes as hereinbefore set forth, but the defendant, wholly unmindful of its duty in the premises, failed, neglected, and refused to pay to the said several county treasurers or either or any of them the taxes so levied and assessed against it in either any or all of said counties, and also failed, neglected, and refused to pay to said county treasurers or either or any of them the first installment thereof, as by the statutes in such cases made and provided they were at liberty to do, by reason whereof the whole of said taxes so levied and assessed against the said defendant in each and every of the above-named counties became and were delinquent, and the penalty of 10% by reason of such delinquencies became and was attached to the taxes so levied and assessed, and the same is now due and owing.

Plaintiff further avers that, although the defendant has been often thereto requested, it has wholly failed, neglected, and refused to pay said taxes so levied and assessed, or any part or parcel thereof, and the same now still remains due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of said taxes, interest, and said delinquent penalty of 10 per cent., together with the penalty of fifty per cent. thereon, as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in the receipt of a large income derived from the carrying on of its business, and is abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused, and as aforesaid, and still fails and refuses to pay the said taxes so levied and assessed against it, yet its property, business, assets, and income are of such a quasi-public character that the public interests may be jeopardized and interfered with in the event that the property owned and operated by it should be levied upon either by a sheriff or by the county treasurers and the property so levied upon exposed to sale, at either a sheriff's or treasurer's sale, by reason of the possible interruption of its duties as a common carrier and the sale of property unnecessary to its operation as such common carrier and in the discharge of the duties owing by it to the public, to this plaintiff, and the Government of the United States, and it has therefore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by said defendant within the State of Indiana, and to carry on the business of an express company pending the collection of the amount so due to this plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the operating expenses, to apply the surplus to the payment and discharge of the amount so due on account of said taxes and the penalties properly due from and chargeable against said defendant until the whole amount shall have been paid.

6 Wherefore plaintiff prays judgment against said defendant for the sum of $15,000 (fifteen thousand dollars), for the appointment of a receiver to take possession and charge of the property, business, and assets of said defendant within the State of Indiana and to carry on said business under the direction of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of said taxes and the penalties thereon until the same shall have been fully paid and discharged, and for all further and proper relief.

ALONZO GREENE SMITH,
Attorney General of Indiana.

LEON O. BAILEY AND
W. A. KETCHAM, *Of Counsel.*

Endorsement on said complaint:

"NOTE.—The clerk will issue process against the defendant, returnable on the 18th day of May, 1894, being the 11th judicial day of the May term of the circuit court of Marion county, Indiana, for the year 1894, at which time the defendant is required to appear and answer the within complaint.

Summons issued to May 18, 1894.

A. G. SMITH,
Attorney General, et al., Attorneys for Plaintiff."

7 And afterwards, to wit, on the 8th day of June, 1894, being the 29th judicial day of the May term, 1894, of the said circuit court in and for the county of Marion, State of Indiana, the following proceeding was had before the Honorable Edgar A. Brown, sole judge thereof, viz:

"Now comes the plaintiff, by counsel, and on its motion the defendant is ruled to answer the complaint herein by Tuesday, June 12th, 1894."

And afterwards, to wit, on the 12th day of June, A. D. 1894, being the 32d judicial day of the May term, 1894, of said court, before the same honorable judge, the following proceeding was had herein:

"Comes now the defendant, by counsel, and files its demurrer to the complaint herein in these words and figures, viz:

STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA } No. 7284. Circuit Court.
vs. } Demurrer.
THE AMERICAN EXPRESS COMPANY. }

Comes the defendant, sued by the name of The American Express Co., and demurs to the complaint herein, and for reason therefor says that said complaint does not state facts sufficient to constitute a cause of action against it.

8 Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

And afterwards, to wit, on the first day of June, 1895, being the 24th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceeding was had herein:

"Comes now the plaintiff, by counsel, and upon its motion leave is granted the plaintiff to file its supplemental complaint herein."

And afterwards, to wit, on the 10th day of June, 1895, being the 31st judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein:

"Comes now the plaintiff, by counsel, and files its supplemental complaint herein, and on its motion the said defendant is ruled by the court to answer the said supplemental complaint herein by the 13th day of June, A. D. 1895.

Said supplemental complaint is in the words and figures following—that is to say:

9 STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS COMPANY. } No. 7284. Circuit Court. Supplemental Complaint.

The said plaintiff, The State of Indiana, by way of supplemental complaint against the defendant, The American Express Company, by leave of the court first had and obtained, complaining, says:

That at and for a long time prior to the first day of April, 1894, and ever since continuously, the defendant has been engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof money, packages, gold, plate, merchandise, freight, and other articles under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true meaning of the statute in such cases made and provided, an express company; that on and subsequent to the first day of April, 1894, such proceedings were had before the State board of tax commissioners of the State of Indiana, the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Adams, Blackford, Brown, Cass, Crawford, Daviess, De Kalb, Dubois, Fulton, Gibson, Harrison, Howard, Huntington, Jackson, Jay, Jefferson, Lagrange, Martin, Miami, Noble, Ohio, Perry, Pike, Scott, Spencer, Steuben, Sullivan, Switzerland, Tipton, Union, Warrick, and Whitley, within the limits of which counties, thirty-two (32) in number, said defendant owned no property subject to taxation and before the various township and county assessors in the various townships, that there *was* assessed against said defendant for the year 1894 taxes in the several counties in the respective amounts named below—that is to say:

In the county of Allen the sum of	$83 12
In the county of Bartholomew the sum of	46 08
In the county of Benton the sum of	153 06
In the county of Boone the sum of	111 15
In the county of Carroll the sum of	113 12
In the county of Clark the sum of	41 50
In the county of Clay the sum of	62 48
In the county of Clinton the sum of	98 61
In the county of Dearborn the sum of	94 87
In the county of Decatur the sum of	208 26
10 In the county of Delaware the sum of	74 10
In the county of Elkhart the sum of	81 52
In the county of Fayette the sum of	46 43
In the county of Floyd the sum of	33 37
In the county of Fountain the sum of	182 36
In the county of Franklin the sum of	117 66
In the county of Grant the sum of	96 17
In the county of Greene the sum of	91 20

In the county of Hamilton the sum of	$65 76
In the county of Hancock the sum of	97 96
In the county of Hendricks the sum of	218 11
In the county of Henry the sum of	161 02
In the county of Jasper the sum of	160 65
In the county of Jennings the sum of	33 55
In the county of Johnson the sum of	68 44
In the county of Knox the sum of	26 89
In the county of Kosciusko the sum of	127 40
In the county of Lake the sum of	266 81
In the county of La Porte the sum of	339 13
In the county of Lawrence the sum of	122 93
In the county of Madison the sum of	190 58
In the county of Marion the sum of	337 07
In the county of Monroe the sum of	97 50
In the county of Montgomery the sum of	130 80
In the county of Morgan the sum of	53 62
In the county of Newton the sum of	168 42
In the county of Orange the sum of	144 00
In the county of Owen the sum of	31 45
In the county of Parke the sum of	194 06
In the county of Porter the sum of	67 69
In the county of Posey the sum of	85 26
In the county of Pulaski the sum of	89 02
In the county of Putnam the sum of	208 37
In the county of Randolph the sum of	160 82
In the county of Ripley the sum of	23 90
In the county of Rush the sum of	81 08
In the county of Shelby the sum of	97 66
In the county of Starke the sum of	24 00
In the county of St. Joseph the sum of	20 10
In the county of Tippecanoe the sum of	265 30
In the county of Vanderburg the sum of	62 29
In the county of Vermillion the sum of	160 46
In the county of Vigo the sum of	127 93
In the county of Warren the sum of	108 83
In the county of Washington the sum of	88 16
In the county of Wayne the sum of	44 67
In the county of White the sum of	146 85
The total taxes so assessed against the defendant in the several counties of the State amounting in the aggregate to	$6,633 50

That thereafter and subsequent to the levying and assessment of said taxes in the said several counties within the State the same were in their respective counties by the several auditors thereof duly extended upon the proper tax duplicates and the duplicates, with the taxes so extended, delivered by the respective auditors of the said several counties on or about the 1st day of January, 1895, to the several treasurers of such counties for proceedings thereon as

required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the third Monday in April, 1895, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said several counties the amounts so respectively levied and assessed against it for State, county, and other purposes, as hereinbefore set forth; but the defendant, wholly unmindful of its duty in the premises failed, neglected, and refused to pay to said several county treasurers or either or any of them the taxes so levied and assessed against it in either, any, or all of said counties, and also failed, neglected, and refused to pay to said county treasurers or either or any of them the first instalment thereof, as by the statute in such cases made and provided they were at liberty to do, by reason whereof the whole of said taxes so levied and assessed against said defendant in each and every of the above-named counties became and were delinquent, and the penalty of 10 per cent., by reason of such delinquencies, became and was attached to the taxes so levied and assessed, and the same is now due and owing.

Plaintiff further avers that although the defendant has been often requested it has wholly failed, neglected, and refused to pay
12 said taxes so levied and assessed or any part or parcel thereof and the same now still remain due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of said taxes, interest, and said delinquent penalty of 10 per cent., together with the penalty of fifty (50) per centum thereon, as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in receipt of a large income derived from the carrying on of its business and is abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused as aforesaid and still fails and refuses to pay the same taxes so levied and assessed against it, yet its property, business, assets, and income are of such a quasi-public character that the public interests may be jeopardized and interfered with in the event that the property owned and operated by it should be levied upon either by a sheriff or by the county treasurer and the property so levied upon exposed to sale at either a sheriff's or treasurer's sale by reason of the possible interruption of its duties as a common carrier and the sale of property unnecessary to its operation as such common carrier and in the discharge of the duties owing by it to the public, to this plaintiff, and to the Government of the United States, and it has therefore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by said defendant within the State of Indiana and to carry on the business of an express company pending the collection of the amount so due to this plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the operating expenses, to apply the surplus to the payment and discharge of the amounts

so due on account of said taxes and the penalties properly due from and chargeable against said defendant until the whole amount shall have been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of fifteen thousand ($15,000) dollars, for the appointment of a receiver to take possession and charge of the property, business, and assets of the said defendant within the State of Indiana, and to carry on said business under the direction of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of
13 said taxes and the penalties thereon until the same shall have been fully paid and discharged; and the plaintiff prays for all further and proper relief.

WM. A. KETCHAM,
Attorney General.
MARRILL MOORES,
Of Counsel."

14 And afterwards, to wit, on the 11th day of June, 1895, being the 32d judicial day of said court for the May term thereof, before the same honorable judge, the following proceeding was had herein, viz:

"Comes again the defendant, by counsel, and files its demurrer to the plaintiff's supplemental complaint herein, said demurrer being in the words and figures following, viz:

STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS COMPANY. } No. 7284. Circuit Court. Demurrer.

Comes the defendant, sued by the name of 'The American Express Co.,' and demurs to the supplemental complaint of the plaintiff filed herein for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant. Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

And afterwards, to wit, on the first day of July, 1895, being the 49th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

15 "Now come the parties, by counsel, and the court, being fully advised in the premises, overrules the demurrers to the complaints herein; to which ruling of the court the defendant at the time excepts and now files its answer to the plaintiff's complaints herein in these words and figures, viz:

16 STATE OF INDIANA, } ss:
Marion County, }

In the Circuit Court of said County, May Term, 1894.

STATE OF INDIANA
vs.
THE AMERICAN EXPRESS COMPANY. } No. 7284.

The defendant, The American Express Company, for answer to the complaint and the supplemented complaint says:

First paragraph. That it is a copartnership or joint stock association, organized in the year 1850 in the State of New York, where its principal office is and always has been. Originally there were 250 equal shares, which have been increased from time to time until they now number 180,000 shares, which are held by about 3,000 different persons. The articles of copartnership provide that the shares may be transferred, and that such transfer or the death of a member shall not work a dissolution of the copartnership, which by the original articles was formed to continue for 10 years and was afterwards, by mutual agreement, extended for 20 years more and again for 30 years. Said copartnership does not differ from an ordinary partnership in any essential respect except in said provision for transfer of shares. None of the copartners are or since the commencement of this suit have been citizens of this State.

17 The defendant is and ever since its organization has been engaged in the express business in the United States, which consists in carrying packages on passenger and express trains, steamboats, and stages in the care and custody of messenger employés of the company, who always accompany the packages. The company has no ownership of or interest in any of the said means of conveyance in the State of Indiana, but merely pays the railroad companies and the owners of steamboats in said State for the transportation of its messengers and their accompanying packages. Aside from certain real estate owned by the defendant in Marion county, Indiana, used by it for barn and stabling purposes and there duly assessed for taxation, it has no property in the State of Indiana except certain horses, wagons, harness, trucks, safes, and office furniture at different points in the State, the items of principal value being the horses, wagons, and trucks used by the company in the collection and delivery of packages in the various towns and cities. In several towns in which it does business it has no property, its express packages being collected and delivered by hand or by means of horses and wagons hired for the purpose. The total value of all of the personal property owned or held by the defendant in the State of Indiana during the years of 1893 and 1894 did not exceed $10,754 in 1893 and $6,765 in 1894, at which sums they were assessed.

The defendant owns similar personal property in other States of the Union, upon which it there pays taxes, and also real estate of the value of about $—, used in connection with its busines- for depot, warehouse, office, and stabling purposes, upon which it pays

taxes, and also stocks and bonds of great value, some of them
18 not taxable at all and none of them being held or owned in the State of Indiana or taxable there.

The principal business of the defendant in the State of Indiana is interstate commerce, to wit, the carrying of express matter between points in the State of Indiana and points in other States and across and through the State of Indiana in the course of transit between other States, although the defendant does some business between points within the State of Indiana.

All of the personal property held or owned by the defendant in the State of Indiana has been duly returned by it for taxation, in accordance with the provisions of section 50 of the act approved March 6, 1891, entitled 'An act concerning taxation, etc.,' and all of said property, together with the defendant's real estate in Marion county, has been duly assessed for taxation for State, county, municipal, and other purposes for the years 1893 and 1894 and preceding years in the various counties and townships in which the same is located as the property of other persons is assessed, and the defendant has duly paid all of said taxes.

The taxes mentioned in the complaint include the taxes so paid by the defendant on its personal property in the State of Indiana in the following amounts and in the following counties:

For the year 1893:

Allen county ..... $
Cass county.....
Vanderburgh county .....
Marion county.....
Vigo county .....
Wayne county .....

19 For the year 1894:

Allen county ..... $
Cass county.....
Vanderburgh county.....
Marion county.....
Vigo county.....
Wayne county .....

The residue of the taxes mentioned in the compalint and *and* sued for and which the defendant admits have not been paid were assessed against this defendant by the State board of tax commissioners under the act of March 6, 1893, entitled 'An act supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships, and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70, and 71 of said act and all laws in conflict therewith, and declaring an emergency.'

The defendant says that said taxes so assessed under said act of March 6, 1893, and sued for are not assessed against any property of the defendant in the State of Indiana, but are in addition to the taxes which have been assessed against the defendant and which the defendant has paid on all of the property, real and personal, held or owned by it in said State during the said years. The defendant says that said act of March 6, 1893, is in contravention of the following provisions of the constitution of the State of Indiana, to wit, article 1, section 12; article 1, section 23; article 3, section 1; article 4, section 22; article 10, section 1, and also because it amends a statute which was unconstitutional and void, said act of March 6, 1891, and especially section 68 thereof, being in violation of section 8, article 1, of the Constitution of the United States, in that it attempted to regulate interstate commerce; and said act of 1893 is also in contravention of the following provisions of the Constitution of the United States, to wit, that part of article 1, section 8, which provides that Congress shall have power of regulating commerce with foreign nations and among the several States; article 4, section 2, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; article 14, sec. 1, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to persons within its jurisdiction the equal protection of the laws.

20

The defendant therefore insists that said act is unconstitutional and void. The defendant nevertheless, in compliance with the demand of the auditor of State, but under protest, insisting that said law was unconstitutional and void, did submit to the auditor of State statements, as required by said law, for each of the years 1893 and 1894. Said statements showed, as the fact was, that although the defendant had real estate of very great value, to wit, situated outside of the State of Indiana, used by it in connection with its business and taxed where situated, that it had no real estate situate outside of the State of Indiana not directly used in the conduct of its business. Said statements also showed the total number and the market value of the defendant's shares on the first day of April in each of said years, and that the defendant had no mortgages upon any of its property, nor any bonded indebtedness.

21

And thereupon the tax commissioners, acting in pursuance of the directions of said law, took the proportion of the aggregate market value of all of the defendant's shares which the length of its lines or routes in the State of Indiana bears to the whole length of its lines or routes and, deducting from the amount so ascertained the assessed value for taxation of the real estate and personal property of the defendant in the State of Indiana hereinbefore mentioned, assessed the balance of said sum against the defendant for taxation in the State of Indiana, such balance being for the year 1893 $458,000 and for the year 1894 $456,500, or at the rate of $250.00 per mile for each mile of its routes in the State, and the taxes sued for are

upon said assessments and include taxes assessed against the defendant by virtue of said proceedings and in pursuance of said law in several counties through or across which the defendant's routes extend, but in which the defendant has no property or offices and does no business.

The defendant says that the principal business of all of the express companies affected by said act of March 6, 1893, is interstate commerce, and that the scheme of taxation thereby provided
22 against express companies, while professing to be a tax upon their property, is really an attempt to enforce against them, in contravention of the Constitution of the United States, the payment of a tax for the privilege of carrying on their business, and that the said assessments sued for are not made against this defendant in respect of any property belonging to it in the State of Indiana or subject to the taxing power of said State.

But if said act can be treated as one for the taxation of the defendant's property in the State of Indiana the defendant insists that it is nevertheless in contravention of the provisions of the constitution of the State of Indiana and of the United States hereinbefore mentioned for the following, among other, reasons:

The value of the defendant's shares and of the shares of express companies generally is determined not so much by the value of the property or appliances which they use in carrying on their business as by the skill, diligence, fidelity, and success with which they conduct their business. The defendant employs thousands of men who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the consequent value of its shares are largely the result of their effort, fidelity, and integrity and of skillful management and supervision of the business. The defendant furthermore owns valuable real estate outside of Indiana, and bonds, stocks, and other securities aggregating millions of dollars, none of which are held or taxable in Indiana at all, all of which, however, together with
23 the company's business connections and the reputation and good will which it has acquired in the course of more than fifty years of public service, as well as its income from business done in the United States outside of Indiana, enter largely into the value of its capital shares.

Nor can the value of the defendant's property in the State of Indiana be ascertained even approximately by applying or considering the proportion which its routes in Indiana bears to the mileage of all its routes, because its earnings are not uniform and in Indiana are less per mile than its earnings in more thickly settled communities and communities of greater business activity and are much less than its average earnings per mile.

Nor does the market price of the defendant's shares afford any fair, reasonable, or just method of estimating the value of its property or fixing a basis of value for purposes of taxation, because the market price is speculative and variable, depending upon financial and other conditions not at all connected with the company, its business or its property.

The defendant has before the commencement of this suit duly complied with the act of the General Assembly approved March 29, 1879, requiring express companies doing business in the State of Indiana, whether a corporation, individuals, or copartnership, to file a certificate authorizing the commencement of actions against them by service upon their agents in the State.

Second paragraph. That it denies each and every material allegation of said complaint.

24 Third paragraph. That before the bringing of this suit it fully paid all taxes of whatever kind assessed in the State of Indiana for the years 1893 and 1894, except those assumed to be assessed by the State board of tax commissioners of said State of Indiana.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

25 And the plaintiff now files its motion to strike out and reject the first paragraph of the defendant's said answer herein; which motion is in these words and figures, viz:

"STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA } No. 7284. Circuit Court. Motion to
vs. } Reject, &c.
THE AMERICAN EXPRESS CO. }

The plaintiff moves the court to reject and strike from the files the first paragraph of the defendant's answer herein for the following reasons, viz:

a. That so far as the same amounts to the general denial—the general denial being already on file—no question is presented thereby.

b. That so far as the same amounts to a plea of payment—an answer of payment being already on file—no question is presented thereby.

c. That, excluding from the consideration the covenants that might be claimed to amount to the general denial or a plea of payment, no facts are stated or set forth in said first paragraph of answer sufficient to constitute a defense to said action.

W. A. KETCHAM, *Att'y Gen'l.*

A. G. SMITH,
LEON O. BAILEY, &
MERRILL MOORES,
Of Counsel."

26 "And the court, having heard the arguments of counsel upon the said motion to reject and strike from the files the said first paragraph of defendant's answer herein, now takes the same under advisement."

And afterwards, to wit, on the 2d day of July, 1895, being the 50th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Come again the parties, by counsel, and the court, being fully advised in the premises, now overrules the plaintiff's motion to strike from the files and reject the first paragraph of the defendant's answer herein; to which ruling of the court the plaintiff at the time excepts, and sixty (60) days are given to prepare and present its bill of exceptions herein.

And thereupon the plaintiff files its demurrer to the first paragraph of the defendant's answer herein in the words and figures following—that is to say:

STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS CO. } No. 7284. Circuit Court. Demurrer.

27 The plaintiff demurs to the first paragraph of the defendant's answer herein, and for reason therefor says that said paragraph of answer does not state facts sufficient to constitute a defense to plaintiff's complaints herein.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY, &
MERRILL MOORES,
Of Counsel."

"And the court, being fully advised in the premises, does now overrule the said demurrer; to which ruling of the court the plaintiff at the time excepts."

And the plaintiff now files its reply in general denial to the first and third paragraphs of the defendant's answer herein in these words and figures, viz:

"STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA
vs.
THE AMERICAN EXPRESS CO. } No. 7284. Circuit Court. Reply.

The plaintiff, for reply to the first and third paragraphs of the defendant's answer herein, denies each and every material allegation therein contained.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY, AND
MERRILL MOORES,
Of Counsel."

28 (MEMORANDUM.—On the said 2d day of July, 1895, by agreement of all parties and by order of the court this cause is consolidated with causes numbered 7288 and 7289 of this court for trial and determination.

For further proceedings herein see under cause number 7289 of this court.)

29 Be it remembered that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, &c., in the circuit court of the county of Marion, State of Indiana, are the following in the cause of—

THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY. } No. 7288.

And be it also remembered that heretofore, to wit, on the 7th day of May, A. D. 1894, the above-named plaintiff, by its attorneys, filed in the office of the clerk of the said Marion circuit court its complaint against the aforesaid defendant in the words and figures following:

30 "STATE OF INDIANA, } *ss:*
County of Marion, }

THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY. } No. 7288. Circuit Court.

Complaint to Enforce Payment of Taxes.

The State of Indiana, plaintiff, complains of The Adams Express Company, defendant, and says that for a long time prior to the first day of April, 1893, and ever since continuously the defendant has been engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof money, packages, gold, silver, plate, merchandise, freight, and other articles, under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true intent and meaning of the statute in such cases made and provided, an express company; that on and subsequent to the first day of April, 1894, such proceedings were had before the State board of tax commissioners of the State of Indiana, the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Benton, Brown, Crawford, De Kalb, Delaware, Dubois, Elkhart, Fountain, Franklin, Harrison, Huntington, Monroe, Ohio, Orange, Perry, Spencer, Steuben, Switzerland, Tippecanoe, Union, Vermillion, Wabash, Warren, Washington, and Wells, within the limits of which counties, twenty-six (26) in number, the said defendant owned no property subject

to taxation, and before the various township and county assessors in the various townships, that there *was* assessed against said defendant for the year 1893 taxes in the several counties in the respective amounts named below—that is to say:

In the county of Adams the sum of	$79	35
In the county of Allen the sum of	178	03
In the county of Bartholomew the sum of	165	29
In the county of Blackford the sum of	54	29
In the county of Boone the sum of	83	64
In the county of Carroll the sum of	63	89
In the county of Cass the sum of	180	60
In the county of Clarke the sum of	167	82
In the county of Clay the sum of	119	71
In the county of Clinton the sum of	79	54
31 In the county of Daviess the sum of	228	35
In the county of Dearborn the sum of	102	67
In the county of Decatur the sum of	24	78
In the county of Fayette the sum of	30	69
In the county of Floyd the sum of	9	17
In the county of Fulton the sum of	55	48
In the county of Gibson the sum of	153	66
In the county of Grant the sum of	93	94
In the county of Greene the sum of	192	01
In the county of Hamilton the sum of	133	32
In the county of Hancock the sum of	65	08
In the county of Hendricks the sum of	154	46
In the county of Henry	167	69
In the county of Howard the sum of	85	99
In the county of Jackson the sum of	346	60
In the county of Jasper the sum of	25	26
In the county of Jay the sum of	126	76
In the county of Jefferson the sum of	64	40
In the county of Jennings the sum of	214	19
In the county of Johnson the sum of	81	07
In the county of Knox the sum of	246	06
In the county of Kosciusko the sum of	73	61
In the county of Lagrange the sum of	45	73
In the county of Lake the sum of	126	75
In the county of Lawrence the sum of	172	90
In the county of La Porte the sum of	57	27
In the county of Madison the sum of	112	11
In the county of Marion the sum of	166	32
In the county of Marshall the sum of	147	95
In the county of Martin the sum of	152	49
In the county of Miami the sum of	69	21
In the county of Montgomery the sum of	126	90
In the county of Morgan the sum of	111	27
In the county of Newton the sum of	47	49
In the county of Noble the sum of	55	11
In the county of Owen the sum of	90	01

In the county of Parke the sum of	$63 19
In the county of Pike the sum of	50 25
In the county of Porter the sum of	80 00
In the county of Posey the sum of	168 22
In the county of Pulaski the sum of	154 79
In the county of Putnam the sum of	57 75
In the county of Randolph the sum of	126 84
In the county of Ripley the sum of	69 95
In the county of Rush the sum of	71 00
In the county of Scott the sum of	91 27
In the county of Shelby the sum of	67 35
In the county of Starke the sum of	94 04
In the county of St. Joseph the sum of	82 22
In the county of Sullivan the sum of	180 68
In the county of Tipton the sum of	88 58
In the county of Vanderburgh the sum of	124 89
In the county of Vigo the sum of	146 50
In the county of Warrick the sum of	19 00
In the county of Wayne the sum of	169 79
In the county of White the sum of	102 25
In the county of Whitley the sum of	40 20
The total taxes so assessed against the defendant in the several counties of the State amount in the aggregate to	$7,377 67

That thereafter and subsequent to the assessment and levying of said taxes in the said several counties within the State the same were in their respective counties by the several auditors thereof duly extended upon the proper tax duplicates, and the duplicates, with the taxes so extended, delivered by the respective auditors of said several counties on or about the first day of January, 1894, to the several treasurers of said counties for proceedings thereon, as required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the 3rd Monday in April, 1894, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said several counties the amounts so respectively levied and assessed against it for State, county, and other purposes, as hereinbefore set forth; but the defendant, wholly unmindful of its duty in the premises, failed, neglected, and refused to pay to said several county treasurers or either or any of them the taxes so levied and assessed against it — either, any, or all
33 of said counties, and also failed, neglected, and refused to pay to said county treasurers or either or any of them the first instalment thereof, as by the statutes in such case made and provided they were at liberty to do, by reason whereof the whole of said taxes so levied and assessed against said defendant in each and every of the above-named counties became and were delinquent, and the penalty of 10 per cent., by reason of such delinquencies, became and was attached to the taxes so levied and assessed, and the same is now due and owing.

Plaintiff further avers that, although the defendant has been often thereto requested, it has wholly failed, neglected, and refused to pay said taxes so levied and assessed or any part or parcel thereof, and the same now still remain due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of said taxes, interest, and said delinquent penalty of 10 per cent., together with the penalty of fifty (50) per centum thereon as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in the receipt of a large income derived from the carrying on of its business and is abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused as aforesaid and still fails and refuses to pay the said taxes so levied and assessed against it, yet its property, business, assets, and income are of such a quasi-public character that the public interest may be jeorpardized and interfered with in the event that the property owned and operated by it should be levied upon either by a sheriff or by the county treasurers, and the property so levied upon exposed to sale at either a sheriff's or treasurer's sale by reason of the possible interruption of its duties as a common carrier and the sale of property unnecessary to its operation as such common carrier, and in the discharge of the duties owing by it to the public, to this plaintiff, and the Government of the United States, and it has therefore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by the said defendant within the State of Indiana, and to carry on the business of an express company, pending the collection of the amount so due to this
34 plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the operating expenses, to apply the surplus to the payment and discharge of the amounts so due on account of said taxes and the penalties properly due from and chargeable against said defendant until the whole shall have been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of twenty thousand dollars ($20,000), for the appointment of a receiver to take the possession and charge of the property, business, and assets of said defendant within the State of Indiana, and to carry on said business under the direction of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of said taxes and the penalties thereon until the same shall have been fully paid and discharged, and plaintiff prays for all further and proper relief.

A. G. SMITH,
Attorney General.

LEON O. BAILEY AND
W. A. KETCHAM,
Of Counsel."

35 And afterwards, to wit, on the 8th day of June, 1894, being the 29th judicial day of the May term, 1894, of the said circuit court in and for the county of Marion, State of Indiana, the following proceeding was had before the Honorable Edgar A. Brown, sole judge thereof, viz:

"Now comes the plaintiff, by counsel, and on its motion the defendant is ruled to answer the complaint herein by Tuesday, June 12th, 1894."

And afterwards, to wit, on the 12th day of June, A. D. 1894, being the 32nd judicial day of the May term, 1894, of said court, before the same honorable judge, the following proceeding was had herein, viz:

"Comes now the defendant, by counsel, and files its demurrer to the complaint herein in these words and figures, viz:

"STATE OF INDIANA, }
County of Marion, } *ss:*

THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY. } No. 7288. Circuit Court. Demurrer.

Comes the defendant, sued by the name of The Adams Express Company, and demurs to the complaint herein, and for
36 reason therefor says that said complaint does not state facts sufficient to constitute a cause of action against it.

Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

And afterwards, to wit, on the first day of June, 1895, being the 24th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceeding was had herein, viz:

"Comes now the plaintiff, by counsel, and upon its motion leave is granted the plaintiff to file its supplemental complaint herein."

And afterwards, to wit, on the 10th day of June, 1895, being the 31st judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein:

"Comes now the plaintiff, by counsel, and files its supplemental complaint herein, and on its motion the said defendant is ruled by the court to answer the said supplemental complaint herein by June 13th, 1895. Said supplemental complaint is in the words and figures following, viz:

37 STATE OF INDIANA, *County of Marion,* } *ss:*

THE STATE OF INDIANA *vs.* THE ADAMS EXPRESS COMPANY. } No. 7288. Marion Circuit Court.

Supplemental Complaint.

The said plaintiff, The State of Indiana, by way of supplemental complaint against the said defendant, The Adams Express Company, by leave of court first had and obtained, complaining, says—

That at and for a long time prior to the first day of April, 1894, and ever since continuously the defendant has been engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof money, packages, gold, silver, plate, merchandise, freight, and other articles under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true intent and meaning of the statute in such cases made and provided, an express company; that on and subsequent to the first day of April, 1894, such proceedings were had before the State board of tax commissioners of the State of Indiana and the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Benton, Brown, Crawford, De Kalb, Delaware, Dubois, Elkhart, Fountain, Franklin, Harrison, Huntington, Monroe, Ohio, Orange, Perry, Spencer, Steuben, Switzerland, Tippecanoe, Union, Vermillion, Wabash, Warren, Washington, and Wells, within the limits of which counties, (26) twenty-six in number, said defendant owned no property subject to taxation, and before the various township and county assessors in the various townships, that there *was* assessed against the said defendant for the year 1894 taxes in the several counties in the respective amounts named below—that is to say:

In the county of Adams the sum of	$103 54
In the county of Allen the sum of	176 73
In the county of Bartholomew the sum of	161 86
In the county of Blackford the sum of	48 83
38 In the county of Boone the sum of	92 22
In the county of Carroll the sum of	70 91
In the county of Cass the sum of	137 67
In the county of Clark the sum of	158 30
In the county of Clay the sum of	119 11
In the county of Clinton the sum of	80 26
In the county of Daviess the sum of	310 75
In the county of Decatur the sum of	22 18
In the county of Dearborn the sum of	77 05
In the county of Fayette the sum of	23 34
In the county of Fulton the sum of	55 46
In the county of Gibson the sum of	154 90
In the county of Grant the sum of	104 33

In the county of Greene the sum of	$221	84
In the county of Hamilton the sum of	147	08
In the county of Hancock the sum of	58	96
In the county of Hendricks the sum of	80	04
In the county of Henry the sum of	163	21
In the county of Howard the sum of	79	35
In the county of Jackson the sum of	327	38
In the county of Jasper the sum of	27	61
In the county of Jay the sum of	135	58
In the county of Jefferson the sum of	59	12
In the county of Jennings the sum of	197	84
In the county of Johnson the sum of	77	86
In the county of Knox the sum of	222	44
In the county of Kosciusko the sum of	104	70
In the county of Lagrange the sum of	46	71
In the county of Lake the sum of	117	09
In the county of Lawrence the sum of	171	38
In the county of Madison the sum of	78	84
In the county of Marion the sum of	213	48
In the county of Marshall the sum of	148	57
In the county of Martin the sum of	181	74
39 In the county of Miami the sum of	67	09
In the county of Montgomery the sum of	147	16
In the county of Morgan the sum of	119	00
In the county of Newton the sum of	55	05
In the county of Noble the sum —	54	20
In the county of Owen the sum of	96	28
In the county of Parke the sum of	74	25
In the county of Pike the sum of	51	82
In the county of Porter the sum of	99	62
In the county of Posey the sum of	176	41
In the county of Pulaski the sum of	155	93
In the county of Putnam the sum of	75	89
In the county of Randolph the sum of	128	69
In the county of Ripley the sum of	69	95
In the county of Rush the sum of	60	63
In the county of Scott the sum of	76	11
In the county of Shelby the sum of	65	60
In the county of Starke the sum of	93	85
In the county of St. Joseph the sum of	76	11
In the county of Sullivan the sum of	180	89
In the county of Tipton the sum of	84	94
In the county of Vanderburgh the sum of	120	36
In the county of Vigo the sum of	180	69
In the county of Warwick the sum of	16	50
In the county of Wayne the sum of	158	95
In the county of White the sum of	107	12
In the county of Whitley the sum of	40	61
The total taxes so assessed against the defendant in the several counties of the State amounting in the aggregate to	$7,291	96

That thereafter and subsequent to the levying and assessment of said taxes in the said several counties within the State the same were in their respective counties by the several auditors thereof duly extended upon the proper tax duplicates and the dupli-
40 cates, with the taxes so extended, delivered by the respective auditors of said several counties on or about the first day of January, 1895, to the several treasurers of such counties for proceedings thereon, as required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the third Monday in April, 1895, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said several counties the amounts so respectively levied and assessed against it for State, county, and other purposes, as hereinbefore set forth; but the defendant, wholly unmindful of its duty in the premises, failed, neglected, and refused to pay to said several county treasurers or either or any of them the taxes so levied and assessed against it in either, any, or all of said counties, and also failed, neglected, and refused to pay to said county treasurers or either or any of them the first instalment thereof, as by the statutes in such cases made and provided they were at liberty to do, by reason whereof the whole of said taxes so levied and assessed against said defendant in each and every of the above-named counties became and were delinquent, and the penalty of 10%, by reason of such delinquencies, became and *were* attached to the taxes so levied and assessed, and the same is now due and owning.

Plaintiff further avers that although the defendant has been often thereto requested it has wholly failed, neglected, and refused to pay said taxes so levied and assessed or any part of parcel thereof, and the same now still remains due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of the said taxes, interest, and said delinquent penalty of 10%, together with the penalty of (50%) 50 per centum thereon, as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in the receipt of a large income derived from the carrying on of its business and abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused as aforesaid
41 and still fails and refuses to pay the said taxes so levied and assessed against it, yet its property, business, assests, and income are of such a quasi-public character that the public interest may be jeopardized and interfered with in the event that the property owned and operated by it should be levied upon either by a sheriff or by the county treasurers and the property so levied upon exposed to sale at either a sheriff's or treasurer's sale by reason of the possible interruption of it duties as a common carrier and the sale of property unnecessary to its operation as such common carrier and in the discharge of the duties owing by it to the public, to this plaintiff, and the Government of the United States, and it has there-

fore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by said defendant within the State of Indiana and to carry on the business of an express company pending the collection of the amount due to this plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the operating expenses, to apply the surplus to the payment and discharge of the amounts so due on account of said taxes and the penalties properly due from and chargeable against said defendant until the whole amount shall have been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of $20,000, twenty thousand dollars, for the appointment of a receiver to take possession and charge of the property, business, and assets of said defendant within the State of Indiana, and to carry on said business under the directions of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of said taxes and penalties thereon until the same shall have been fully paid and discharged; and plaintiff prays for all further and proper relief.

W. A. KETCHAM,
Attorney General.
MERRILL MOORES,
For the State."

42 And afterwards, to wit, on the 11th day of June, 1895, being the 32nd judicial day of the May term, 1895, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes again the defendant, by counsel, and files its demurrer to the plaintiff's supplemental complaint herein, said demurrer being in the words and figures following, viz:

STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA }
vs. } No. 7288. Circuit Court. Demurrer.
THE ADAMS EXPRESS CO. }

Comes the defendant, sued by the name of 'The Adams Express Company,' and demurs to the supplemental complaint of the plaintiff filed herein for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant. Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

And afterwards, to wit, on the first day of July, 1895,
43 being the 49 judicial day of the May term, 1895, of the said court, before the same honorable judge, the following proceedings were had herein, viz:

"Now come the parties, by counsel, and the court, being fully advised in the premises, overrules the demurrers to the complaints herein; to which ruling of the court the defendant at the time excepts, and now files its answer to the plaintiff's complaints herein in these words and figures—that is to say:

44 STATE OF INDIANA, } ss:
Marion County, }

In the Circuit Court of said County, May Term, 1894.

STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY. } No. 7288. Answer.

The defendant, The Adams Express Company, for answer to the complaint and the supplemented complaint, says—

That it is a copartnership or joint stock association, organized in the year 1854 in the State of New York, where its principal office is and always has been. Originally there were 1,200 equal shares, which have been increased from time to time until they now number 120,000 shares, which are held by about 3,000 different persons. The articles of copartnership provide that the shares may be transferred, and that such transfer or the death of a member shall not work a dissolution of the copartnership, which by the original articles was formed to continue for 20 years and was afterwards by mutual agreement extended for 20 years more and again for 25 years. Said copartnership does not differ from an ordinary partnership in any essential respect except in said provision for transfer of shares. None of the copartners are or since the commencement of this suit have been citizens of this State.

The defendant is and ever since its organization has been engaged in the express business in the United States, which consists in carrying packages on passenger and express trains,
45 steamboats, and stages in the care and custody of messenger employés of the company, who always accompany the packages. The company has no ownership of or interest in any of the said means of conveyance in the State of Indiana, but merely pays the railroad companies and the owners of steamboats in said State for the transportation of its messengers and their accompanying packages. Aside from certain real estate owned by the defendant in Marion county, Indiana, used by it for depot and office purposes and there duly assessed for taxation, it has no property in the State of Indiana except certain horses, wagons, harness, trucks, safes, and office furniture at different points in the State, the items of principal value being the horses, wagons, and trucks used by the company in the collection and delivery of packages in the various towns and cities. In several towns in which it does business it has

no property, its express packages being collected and delivered by hand or by means of horses and wagons hired for the purpose. The total value of all the personal property owned or held by the defendant in the State of Indiana during the years of 1893 and 1894 did not exceed $10,172.00.

The defendant owns similar personal property in other States of the Union upon which it there pays taxes, and also real estate of the value of about $—, used in connection with its business for depot, warehouse, office, and stabling purposes, upon which it pays taxes, and also stocks and bonds of great value, some of them not taxable at all and none of them being held or owned in the State of Indiana or taxable there.

46 The principal business of the defendant in the State of Indiana is interstate commerce, to wit, the carrying of express matter between points in the State of Indiana and points in other States and across and through the State of Indiana in the course of transit between other States, although the defendant does some business between points within the State of Indiana.

All of the personal property held or owned by the defendant in the State of Indiana has been duly returned by it for taxation in accordance with the provisions of section 50 of the act approved March 6, 1891, entitled "An act concerning taxation, etc.," and all of said property, together with the defendant's real estate in Marion county, has been duly assessed for taxation for State, county, municipal, and other purposes for the years 1893 and 1894 and preceding years in the various counties and townships in which the same is located as the property of other persons is assessed, and the defendant has duly paid all of said taxes.

The taxes mentioned in the complaint include the taxes so paid by the defendant on its personal property in the State of Indiana in the following amounts and in the following counties:

For the year 1893:

Allen county..... $
Cass county.....
Vanderburgh county.....
Marion county.....
Vigo county.....
Wayne county.....

47 For the year 1894:

Allen county.....
Cass county.....
Vanderburgh county.....
Marion county.....
Vigo county.....
Wayne county.....

The residue of the taxes mentioned in the complaint and sued for were assessed against this defendant by the State board of tax commissioners under the act of March 6, 1893, entitled "An act supple-

mentary to and amendatory of an act entitled 'An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency,' approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships, and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70, and 71 of said act and all laws in conflict therewith, and declaring an emergency."

The defendant says that said taxes so assessed under said act of March 6, 1893, and sued for are not assessed against any property of the defendant in the State of Indiana, but are in addition to the taxes which have been assessed against the defendant and which the defendant has paid on all of the property, real and personal, held or owned by it in said State during the said years. The defendant says that said act of March 6, 1893, is in contraven-
48 tion of the following provisions of the constitution of the State of Indiana, to wit, article 1, section 12; article 1, section 23; article 3, section 1; article 4, section 22; article 10, section 1; and also because it amends a statute which was unconstitutional and void, said act of March 6, 1891, and especially section 68 thereof, being in violation of section 8, article 1, of the Constitution of the United States, in that it attempted to regulate interstate commerce; and said act of 1893 is also in contravention of the following provisions of the Constitution of the United States, to wit, that part of article 1, section 8, which provides that Congress shall have power of regulating commerce with foreign nations and among the several States; article 4, section 2, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; article 14, sec. 1, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to persons within its jurisdiction the equal protection of the laws.

The defendant therefore insists that said act is unconstitutional and void. The defendant nevertheless, in compliance with the demand of the auditor of State, but under protest, insisting that said law was unconstitutional and void, did submit to the auditor of State statements, as required by said law, for each of the years 1893 and 1894. Said statements showed, as the fact was, that although the defendant had real estate of very great value, to wit, $——,
49 situated outside of the State of Indiana used by it in connection with its business and taxed where situated, that it had no real estate situate outside of the State of Indiana not directly used in the conduct of its business. Said statements also showed the total number and the market value of the defendant's shares on the first day of April in each of said years, and that the defendant had no mortgages upon any of its property nor any bonded indebtedness.

And thereupon the tax commissioners, acting in pursuance of the

directions of said law, took the proportion of the aggregate market value of all of the defendant's shares which the length of its lines or routes in the State of Indiana bears to the whole length of its lines or routes, and, deducting from the amount so ascertained the assessed value for taxation of the real estate and personal property of the defendant in the State of Indiana hereinbefore mentioned, assessed the balance of said sum against the defendant for taxation in the State of Indiana, such balance being for the year 1893 $539,500, and for the year 1894 $540,250, or at the rate of $250.00 per mile for each mile of its routes in the State, and the taxes sued for are upon said assessments and include taxes assessed against the defendant by virtue of said proceedings and in pursuance of said law in several counties through or across which the defendant's routes extend, but in which the defendant has no property or offices and does no business.

The defendant says that the principal business of all of the express companies affected by said act of March 6, 1893, is interstate commerce, and that the scheme of taxation thereby provided
50 against express companies, while professing to be a tax upon their property, is really an attempt to enforce against them, in contravention of the Constitution of the United States, the payment of a tax for the privilege of carrying on their business, and that the said assessments sued for are not made against this defendant in respect of any property belonging to it in the State of Indiana or subject to the taxing power of said State.

But if said act can be treated as one for the taxation of the defendant's property in the State of Indiana, the defendant insists that it is nevertheless in contravention of the provisions of the constitution of the State of Indiana and of the United States hereinbefore mentioned for the following, among other, reasons:

The value of the defendant's shares and of the shares of express companies generally is determined not so much by the value of the property or appliances which they use in carrying on their business as by the skill, diligence, fidelity, and success with which they conduct their business. The defendant employs thousands of men, who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the consequent value of its shares are largely the result of their effort, fidelity, and integrity and of skillful management and supervision of the business. The defendant furthermore owns valuable real estate outside of Indiana and bonds, stocks, and other securities aggregating millions of dollars, none of which are held or taxable in Indiana at all, all of which, however, together with the company's business connections
51 and the reputation and good will which it has acquired in the course of more than fifty years of public service, as well as its income from business done in the United States outside of Indiana, enter largely into the value of its capital shares.

Nor can the value of the defendant's property in the State of Indiana be ascertained even approximately by applying or considering the proportion which its routes in Indiana bears to the mile-

age of all its routes, because its earnings are not uniform and in Indiana are less per mile than its earnings in more thickly settled communities and communities of greater business action and are much less than its average earnings per mile.

Nor does the market price of the defendant's shares afford any fair, reasonable, or just method of estimating the value of its property or fixing a basis of value for purposes of taxation, because the market price is speculative and variable, depending upon financial and other conditions not at all connected with the company, its business or its property.

The defendant has, before the commencement of this suit, duly complied with the act of the General Assembly of the State of Indiana approved March 29, 1879, requiring express companies doing business in the State of Indiana, whether a corporation, individuals, or copartnership, to file a certificate authorizing the commencement of actions against them by service upon their agents in the State.

52 Second paragraph. That it denies each and every material allegation of said complaint.

Third paragraph. That before the bringing of this suit it fully paid all taxes of whatever kind assessed against it in the State of Indiana for the years 1893 and 1894, except those assumed to be assessed by the State board of tax commissioners of said State of Indiana.

Wherefore the defendant prays judgment for costs.

RAMSEY, MAXWELL & RAMSEY AND
BAKER & DANIELS, *Att'ys for D'f'dant.*"

53 And the plaintiff now files its motion to strike out and reject the first paragraph of the defendant's answer herein; which motion is in the words and figures following, viz:

"STATE OF INDIANA, } *ss:*
County of Marion, }

THE STATE OF INDIANA } No. 7288. Circuit Court. Motion to
vs. } Reject, &c.
THE ADAMS EXPRESS CO. }

The plaintiff moves the court to reject and strike from the files the first paragraph of the defendant's answer herein for the following reasons, viz:

a. That so far as the same amounts to the general denial, the general denial being already on file, no question is presented thereby.

b. That so far as the same amounts to a plea of payment, an answer of payment being already on file, no question is presented thereby.

c. That excluding from the consideration the covenants that might be claimed to amount to the general denial or a plea of pay-

ments, no facts are stated or set forth in said first paragraph
54 of answer sufficient to constitute a defence to the said action.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY, AND
MERRILL MOORES,
Of Counsel."

"And the court, having heard the argument of counsel upon the said motion to reject and strike from the files the said first paragraph of defendant's answer herein, now takes the same under advisement."

And afterwards, to wit, on the 2d day of July, 1895, being the 50th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Come again the parties, by counsel, and the court, being fully advised in the premises, now overrules the said plaintiff's motion to strike from the files and reject the first paragraph of the defendant's answer herein; to which ruling of the court the plaintiff at the time excepts, and sixty (60) days are given to prepare and present its bill of exceptions herein."

And thereupon the plaintiff files its demurrer to the first
55 paragraph of the defendant's answer herein in the words and figures following:

"STATE OF INDIANA, } *ss:*
Marion County, }

THE STATE OF INDIANA }
vs. } No. 7288. Circuit Court. Demurrer.
THE ADAMS EXPRESS CO. }

The plaintiff demurs to the first paragraph of the defendant's answer herein, and for reason therefor says that said paragraph of answer does not state facts sufficient to constitute a defense to plaintiff's complaints herein.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY, AND
MERRILL MOORES,
Of Counsel."

"And the court, being fully advised in the premises, does now here overrule the said demurrer; to which ruling of the court the plaintiff at the time excepts."

"And the plaintiff now files its reply in general denial to the first paragraph of the defendant's answer herein as follows—that is to say:"

56 "STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA }
vs. } No. 7288. Circuit Court. Reply.
THE ADAMS EXPRESS CO. }

The plaintiff, for reply to the first and third paragraphs of the defendant's answer herein, denies each and every material allegation therein contained.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY, AND
MERRILL MOORES,
Of Counsel."

(MEMORANDUM.—On the said 2d day of July, 1895, by agreement of all parties and by order of the court, this cause is consolidated with causes numbered 7284 and 7289 of this court for trial and determination.

For further proceedings herein see under cause numbered 7289 of this court.)

57 Be it remembered that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, &c., in the circuit court of the county of Marion, State of Indiana, are the following in the cause of—

THE STATE OF INDIANA }
vs. } No. 7289.
THE UNITED STATES EXPRESS COMPANY. }

And be it also remembered that heretofore, to wit, on the 7th day of May, A. D. 1894, the above-named plaintiff, by its attorneys, filed in the office of the clerk of the said Marion circuit court its complaint against the aforesaid defendant in the words and figures following:

58 "STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA }
vs. } No. 7289. Circuit Court. Complaint to Enforce Payment of Taxes.
THE UNITED STATES EXPRESS COMPANY. }

The State of Indiana, plaintiff, complains of The United States Express Company, a corporation organized and existing under and by virtue of the laws of the State of ——, defendant, and says that for a long time prior to the first day of April, 1893, and ever since continuously, the defendant has been engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof

money, packages, gold, silver, plate, merchandise, freight, and other articles under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true intent and meaning of the statute in such cases made and provided, an express company; that on and subsequent to the first day of April, 1893, such proceedings were had before the State board of tax commissioners of the State of Indiana, the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Adams, Bartholomew, Boone, Brown, Carroll, Cass, Clarke, Clay, Daviess, Dearborn, Decatur, Fountain, Franklin, Greene, Hendricks, Huntington, Jackson, Jefferson, Jennings, Johnson, Knox, Lawrence, Martin, Monroe, Montgomery, Morgan, Ohio, Orange, Owen, Parke, Posey, Pulaski, Putnam, Randolph, Ripley, Scott, Sullivan, Switzerland, Vermillion, Vigo, Warren, Wabash, Washington, White, and Whitley, within the limits of which counties, 45 in number, said defendant owned no property subject to taxation, and before the various township and county assessors in the various townships, that there *was* assessed against said defendant for the year 1893 taxes in the several counties in the respective amounts named below—that is to say:

In the county of Allen the sum of	$60 12
In the county of Benton the sum of	49 58
In the county of Blackford the sum of	35 07
In the county of Clinton the sum of	61 18
In the county of Crawford the sum of	62 35
In the county of De Kalb the sum of	136 70
59 In the county of Delaware the sum of	122 40
In the county of Dubois the sum of	81 67
In the county of Elkhart the sum of	105 67
In the county of Fayette the sum of	37 99
In the county of Floyd the sum of	18 02
In the county of Fulton the sum of	29 90
In the county of Gibson the sum of	62 27
In the county of Grant the sum of	41 95
In the county of Hamilton the sum of	52 55
In the county of Hancock the sum of	17 15
In the county of Harrison the sum of	63 26
In the county of Henry the sum of	82 73
In the county of Howard the sum of	27 17
In the county of Jasper the sum of	53 12
In the county of Jay the sum of	65 27
In the county of Kosciusko the sum of	24 64
In the county of Lagrange the sum of	28 00
In the county of Lake the sum of	93 22
In the county of La Porte the sum of	98 10
In the county of Madison the sum of	39 09
In the county of Marion the sum of	56 85
In the county of Marshall the sum of	104 66

In the county of Miami the sum of	$90 00
In the county of Newton the sum of	3 36
In the county of Noble the sum of	81 10
In the county of Perry the sum of	26 71
In the county of Pike the sum of	38 00
In the county of Porter the sum of	56 20
In the county of Rush the sum of	44 74
In the county of Shelby the sum of	19 10
In the county of Spencer the sum of	139 58
In the county of Starke the sum of	56 66
In the county of Steuben the sum of	38 10
In the county of St. Joseph the sum of	59 80
In the county of Tippecanoe the sum of	79 02
In the county of Tipton the sum of	86 30
In the county of Union the sum of	47 96
In the county of Vanderburgh the sum of	18 90
In the county of Warrick the sum of	63 94
In the county of Wayne the sum of	24 38
In the county of Wells the sum of	61 88
The total taxes so assessed against the said defendant in the several counties of the State amounting in the aggregate to	$2,746 42

That thereafter and subsequent to the levying and assessment of said taxes in the said several counties within the State the same were, in their respective counties, by the several auditors thereof, duly extended upon the proper tax duplicates, and the duplicates, with the taxes so extended, delivered by the respective auditors of said several counties on or about the first day of January, 1894, to the several treasurers of such counties for proceedings thereon as required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the third Monday in April, 1894, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said several counties the amount so respectively levied and assessed against it for State, county, and other purposes as hereinbefore set forth, but the defendant, wholly unmindful of its duty in the premises, failed, neglected, and refused to pay to the said several county treasurers or either or any of them the taxes so levied and assessed against it in either any or all of said counties, and also failed, neglected, and refused to pay to said county treasurers or either or any of them the first instalment thereof, as by the statutes in such cases made and provided they were at liberty to do, by reason whereof the whole of said taxes so levied and assessed against the said defendant *and* each and every of the above-named counties became and were delinquent, and the penalty of ten per cent. by reason of such delinquencies became and was attached to the taxes so levied and assessed, and the same is now due and owing.

Plaintiff further avers that, although the defendant has been often thereto requested, it has wholly failed, neglected, and refused to pay

said taxes so levied and assessed, or any part or parcel thereof, and the same now still remains due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of said taxes, interest, and said delinquent penalty of ten per cent., together with the penalty of 50 per
61 cent. thereon, as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in the receipt of a large income derived from the carrying on of its business, and is abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused, as aforesaid, and still fails and refuses to pay the said taxes so levied and assessed against it, yet its property, business, assets, and income are of such a quasi-public character that the public interests may be jeopardized and interfered with in the event that the property owned and operated by it should be levied upon either by a sheriff or by the county treasurers and the property so levied upon exposed to sale, by either a sheriff's or treasurer's sale, by reason of the possible interruption of its duties as a common carrier and the sale of property unnecessary to its operation as such common carrier and in the discharge of the duties owing by it to the public, to this plaintiff, and the Government of the United States, and it has therefore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by said defendant within the State of Indiana, and to carry on the business of an express company pending the collection of the amount so due to this plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the said operating expenses, to apply the surplus to the payment and discharge of the amount so due on account of said taxes and the penalties properly due from and chargeable against said defendant until the whole amount shall have been paid.

Wherefore plaintiff prays judgment against said defendant for the sum of $8,000 (eight thousand dollars), for the appointment of a receiver to take possession and charge of the property, business, and assets of said defendant within the State of Indiana and to carry on said business under the directions of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of said taxes and the penalties thereon until the same shall have been paid and fully discharged, and plaintiff prays for all further and proper relief.

ALONZO GREENE SMITH,
Attorney General of Indiana.

LEON O. BAILEY AND
WM. A. KETCHAM,
Of Counsel."

62 And afterwards, to wit, on the 8th day of June, 1894, being the 29th judicial day of the May term, 1894, of said cir-

cuit court in and for the county of Marion, State of Indiana, the following proceeding was had herein before the Honorable Edgar A. Brown, sole judge thereof, viz:

"Now comes the plaintiff, by counsel, and on its motion the defendant is ruled to answer the complaint herein by Tuesday, June 12th, 1894."

And afterwards, to wit, on the 12th day of June, 1894, being the 32d judicial day of the May term, 1894, of said court, before the same honorable judge, the following proceeding was had herein:

"Comes now the defendant, by counsel, and files its demurrer to the complaint herein in these words and figures, viz:

STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA } No. 7289. Circuit Court.
vs. } Demurrer.
THE UNITED STATES EXPRESS CO. }

Comes the defendant, sued by the name of The United States Express Company, and demurs to the complaint herein, and
63 for reason therefor says that said complaint does not state facts sufficient to constitute a cause of action against it.

Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

And afterwards, to wit, on the first day of June, 1895, being the 24th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceeding was had herein, viz:

"Comes now the plaintiff, by counsel, and upon its motion leave is granted the plaintiff to file its supplemental complaint herein."

And afterwards, to wit, on the 10th day of June, 1895, being the 31st judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein—that is to say:

"Comes now the plaintiff, by counsel, and files its supplemental complaint herein, and on its motion the defendant is ruled by the court to answer said supplemental complaint herein by June 13th, 1895.

Said supplemental complaint is in the words and figures following, viz:

64 'STATE OF INDIANA, } ss:
"*County of Marion*, }

THE STATE OF INDIANA } No. 7289. Circuit Court.
vs. } Supplemental Com-
THE UNITED STATES EXPRESS COMPANY. } plaint.

The said plaintiff, The State of Indiana, by way of supplemental complaint against the said defendant, The United States Express Company, by leave of the court first had and obtained, complaining, says—

That at and for a long time prior to the first day of April, 1894, and ever since continuously, the defendant has been engaged in conveying to, from, in, through, and across the State of Indiana and parts thereof money, packages, gold, silver, plate, merchandise, freight, and other articles under contracts with divers and sundry railroad companies and the managers, lessees, and agents thereof, said defendant not, however, being itself a railroad company, and said defendant is, within the true intent and meaning of the statutes in such cases made and provided, an express company; that on and subsequent to the first day of April, 1894, such proceedings were had before the State board of tax commissioners of the State of Indiana, the several county boards of review within each and every of the counties in the State of Indiana, save and excepting only the counties of Adams, Bartholomew, Boone, Brown, Cass, Carroll, Clark, Clay, Daviess, Dearborn, Decatur, Fountain, Franklin, Greene, Hendricks, Huntington, Jackson, Jefferson, Jennings, Johnson, Knox, Lawrence, Martin, Monroe, Montgomery, Morgan, Ohio, Orange, Owen, Parke, Posey, Pulaski, Putnam, Randolph, Ripley, Sullivan, Scott, Switzerland, Vermillion, Vigo, Warren, Wabash, Washington, White, and Whitley, within the limits of which counties, forty-five (45) in number, said defendant owned no property subject to taxation and before the various townships and county assessors in the various townships, that there *was* assessed against said defendant for the year 1894 taxes in the several counties in the respective amounts named below—that is to say:

In the county of Allen the sum of	$53 07
In the county of Benton the sum of	57 85
In the county of Blackford the sum of	34 95
In the county of Boone the sum of	59 03
In the county of Clinton the sum of	59 95
In the county of Crawford the sum of	142 97
In the county of De Kalb the sum of	134 95
65 In the county of Delaware the sum of	115 23
In the county of Dubois the sum of	72 35
In the county of Elkhart the sum of	102 66
In the county of Fayette the sum of	30 70
In the county of Floyd the sum of	15 35
In the county of Fulton the sum of	29 94
In the county of Gibson the sum of	53 32
In the county of Grant the sum of	99 96

In the county of Hamilton the sum of	$102	49
In the county of Hancock the sum of	19	75
In the county of Harrison the sum of	54	90
In the county of Henry the sum of	74	55
In the county of Howard the sum of	31	35
In the county of Jasper the sum of	53	18
In the county of Jay the sum of	71	47
In the county of Kosciusko the sum of	46	45
In the county of Lagrange the sum of	27	31
In the county of Lake the sum of	92	49
In the county of La Porte the sum of	103	16
In the county of Madison the sum of	65	93
In the county of Marion the sum of	89	13
In the county of Marshall the sum of	107	43
In the county of Miami the sum of	78	49
In the county of Montgomery the sum of	40	78
In the county of Newton the sum of	3	97
In the county of Noble the sum of	89	36
In the county of Perry the sum of	27	65
In the county of Pike the sum of	49	14
In the county of Porter the sum of	75	71
In the county of Rush the sum of	64	93
In the county of Shelby the sum of	20	28
In the county of Spencer the sum of	142	87
In the county of Starke the sum of	56	05
In the county of Steuben the sum of	38	02
In the county of St. Joseph the sum of	69	54
In the county of Tippecanoe the sum of	74	74
In the county of Tipton the sum of	80	53
In the county of Union the sum of	48	80
In the county of Vanderburg the sum of	19	12
66 In the county of Wabash the sum of	105	40
In the county of Warrick the sum of	59	26
In the county of Wayne the sum of	24	90
In the county of Wells the sum of	61	48
The total taxes so assessed against the defendant in the several counties of the State amounting in the aggregate to	$3,233	89

That thereafter and subsequent to the levying and assessment of said taxes in the said several counties within the State the same were in their respective counties by the several auditors thereof duly extended upon the proper tax duplicates and the duplicates, with the taxes so extended, delivered by the respective auditors of said several counties on or about the first day of January, 1895, to the several treasurers of such counties for proceedings thereon as required by law, and such duplicates were thenceforth continuously in the hands of such county treasurers until and since the third Monday in April, 1895, and it then and there was and thereby became the duty of the defendant to pay to the treasurers of said sev-

eral counties the amounts so respectively levied and assessed against it for State, county, and other purposes, as hereinbefore set forth; but the defendant, wholly unmindful of its duty in the premises, failed, neglected, and refused to pay to the said several county treasurers or either or any of them the taxes so levied and assessed against it in either, any, or all of said counties, and also failed, neglected, and refused to pay to said county treasurer or either or any of them the first instalment thereof, as by the statutes in such cases made and provided it was at liberty to do, by reason whereof the whole of said taxes so levied and assessed against said defendant in each and every of the above last-named counties became and were delinquent, and the penalty of 10 per cent., by reason of such delinquencies, became and was attached to the taxes so levied and assessed, and the same is now due and owing.

Plaintiff further avers that although the defendant has been often thereto requested it has wholly failed, neglected, and refused to pay said taxes so levied and assessed or any part or parcel thereof and the same now still remain due and uncollected, whereby a right of action has accrued to this plaintiff to have and recover of the defendant the full amount of said taxes, interest,
67 and said delinquent penalty of 10 %, together with the penalty of fifty per centum thereon, as provided by the statute in relation thereto.

Plaintiff further avers that although said defendant owns and controls within the State of Indiana a large amount of property, real and personal, and although it is daily in the receipt of a large income derived from the carrying on of its business and is abundantly solvent and able to pay the said taxes so levied and assessed against it, and although it has always refused as aforesaid and still fails and refuses to pay the said taxes so levied and assessed against it, yet its property, business, assets, and income are of such a quasi-public character that the public interests may be jeopardized and interfered with in the event that the property — and operated by it should be levied upon either by a sheriff or by the county treasurers and the property so levied upon exposed to sale at either a sheriff's or treasurer's sale by reason of the possible interruption of its duties as a common carrier and the sale of property unnecessary to its operation as such common carrier and in the discharge of the duties owing by it to the public, this plaintiff, and the Government of the United States, and it has therefore become and is necessary that a receiver should be appointed upon the final hearing of this cause to take possession of the property owned, controlled, and operated by said defendant within the State of Indiana and to carry on the business of an express company pending the collection of the amount so due to this plaintiff, and out of the receipts and income arising from the operation of said business, after defraying the operating expenses, to apply the surplus to the payment and discharge of the amounts so due on account of said taxes and the penalties properly due from and chargeable against the said defendant until the whole amount shall have been paid.

Wherefore plaintiff prays judgment against said defendant for

the sum of eight thousand ($8,000) dollars, for the appointment of a receiver to take possession and charge of the property, business, and assets of said defendant within the State of Indiana, and to carry on the said business under the direction of this court, applying the income and receipts arising therefrom to the payment of the operating expenses and of the amount so due on account of said taxes and the penalties thereon until the same shall have been duly paid and discharged; and the plaintiff prays for all further and proper relief.

W. A. KETCHAM,
Attorney General.
MERRILL MOORES,
For the State."

68 And afterwards, to wit, on the 11th day of June, 1895, being the 32d judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceeding was had herein:

"Comes again the defendant, by counsel, and files its demurrer to the plaintiff's supplemental complaint herein, said demurrer being in the words and figures following, viz:

"STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA } No. 7289. Circuit Court. Demurrer.
vs.
THE UNITED STATES EXPRESS CO. }

Comes the defendant, sued as 'The United States Express Company,' and demurs to the supplemental complaint of the plaintiff filed herein for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant. Wherefore, &c.

LAWRENCE MAXWELL, JR.,
BAKER & DANIELS,
Attorneys for Def't."

69 And afterwards, to wit, on the first day of July, 1895, being the 49th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Now come the parties, by counsel, and the court, being fully advised in the premises, overrules the demurrers to the complaints herein; to which ruling of the court the defendant at the time excepts and now files its answer to the plaintiff's complaints herein in these words and figures:

70 STATE OF INDIANA, } ss:
Marion County, }

In the Circuit Court of said County, May Term, 1894.

STATE OF INDIANA
vs.
THE UNITED STATES EXPRESS COMPANY. } Answer. No. 7289.

The defendant, The United States Express Company, for answer to the complaint and the supplemented complaint says:

First paragraph. That it is a copartnership or joint stock association, organized in the year 1854 in the State of New York, where its principal office is and always has been. Originally there were 5,000 equal shares, which have been increased from time to time until they now number 100,000 shares, which are held by about 3,000 different persons. The articles of copartnership provide that the shares may be transferred, and that such transfer or the death of a member shall not work a dissolution of the copartnership, which by the original articles was formed to continue for 10 years and was afterwards, by mutual agreement, extended for 20 years more and again for 30 years. Said copartnership does not differ from an ordinary partnership in any essential respect except in said provision for transfer of shares. None of the copartners are or since the commencement of this suit have been citizens of this State.

71 The defendant is and ever since its organization has been engaged in the express business in the United States, which consists in carrying packages on passenger and express trains, steamboats, and stages in the care and custody of messenger employés of the company, who always accompany the packages. The company has no ownership of or interest in any of the said means of conveyance in the State of Indiana, but merely pays the railroad companies and the owners of steamboats in said State for the transportation of its messengers and their accompanying packages. Aside from certain leasehold interest in real estate in Marion county, Indiana, used by it for barn and stabling purposes and there duly assessed for taxation, it has no property in the State of Indiana except certain horses, wagons, harness, trucks, safes, and office furniture at different points in the State, the items of principal value being the horses, wagons, and trucks used by the company in the collection and delivery of packages in the various towns and cities. In several towns in which it does business it has no property, its express packages being collected and delivered by hand or by means of horses and wagons hired for the purpose. The total value of all of the personal property owned or held by the defendant in the State of Indiana during the years of 1893 and 1894 did not exceed $6,757.00, at which it was assessed.

The defendant owns similar personal property in other States of the Union, upon which it there pays taxes, and also real estate of the value of about $—, used in connection with its busines- for depot, warehouse, office, and stabling purposes, upon which it pays

taxes, and also stocks and bonds of great value, some of them
72 not taxable at all and none of them being held or owned in the State of Indiana or taxable there.

The principal business of the defendant in the State of Indiana is interstate commerce, to wit, the carrying of express matter between points in the State of Indiana and points in other States and across and through the State of Indiana in the course of transit between other States, although the defendant does some business between points within the State of Indiana.

All of the personal property held or owned by the defendant in the State of Indiana has been duly returned by it for taxation, in accordance with the provisions of section 50 of the act approved March 6, 1891, entitled 'An act concerning taxation, etc.,' and all of said property, together with the defendant's real estate in Marion county, has been duly assessed for taxation for State, county, municipal, and other purposes for the years 1893 and 1894 and preceding years in the various counties and townships in which the same is located as the property of other persons is assessed, and the defendant has duly paid all of said taxes.

The taxes mentioned in the complaint include the taxes so paid by the defendant on its personal property in the State of Indiana in the following amounts and in the following counties:

For the year 1893:

Allen county ..... $
Cass county .....
Vanderburgh county .....
Marion county .....
Vigo county .....
Wayne county .....

73 For the year 1894:

Allen county ..... $
Cass county .....
Vanderburgh county .....
Marion county .....
Vigo county .....
Wayne county .....

The residue of the taxes mentioned in the compalint and *and* sued for and which the defendant admits have not been paid were assessed against this defendant by the State board of tax commissioners under the act of March 6, 1893, entitled 'An act supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships, and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70, and 71 of

said act and all laws in conflict therewith, and declaring an emergency.'

The defendant says that said taxes so assessed under said act of March 6, 1893, and sued for are not assessed against any property of the defendant in the State of Indiana, but are in addition to the taxes which have been assessed against the defendant and which the defendant has paid on all of the property, real and personal, held or owned by it in said State during the said years. The defendant says that said act of March 6, 1893, is in contraven-
74 tion of the following provisions of the constitution of the State of Indiana, to wit, article 1, section 12; article 1, section 23; article 3, section 1; article 4, section 22; article 10, section 1, and also because it amends a statute which was unconstitutional and void, said act of March 6, 1891, and especially section 68 thereof, being in violation of section 8, article 1, of the Constitution of the United States, in that it attempted to regulate interstate commerce; and said act of 1893 is also in contravention of the following provisions of the Constitution of the United States, to wit, that part of article 1, section 8, which provides that Congress shall have power of regulating commerce with foreign nations and among the several States; article 4, section 2, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; article 14, sec. 1, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to persons within its jurisdiction the equal protection of the laws.

The defendant therefore insists that said act is unconstitutional and void. The defendant nevertheless, in compliance with the demand of the auditor of State, but under protest, insisting that said law was unconstitutional and void, did submit to the auditor of State statements, as required by said law, for each of the years 1893 and 1894. Said statements showed, as the fact was, that although the defendant had real estate of very great value, to wit, situated
75 outside of the State of Indiana, used by it in connection with its business and taxed where situated, that it had no real estate situate outside of the State of Indiana not directly used in the conduct of its business. Said statements also showed the total number and the market value of the defendant's shares on the first day of April in each of said years, and that the defendant had no mortgages upon any of its property, nor any bonded indebtedness.

And thereupon the tax commissioners, acting in pursuance of the directions of said law, took the proportion of the aggregate market value of all of the defendant's shares which the length of its lines or routes in the State of Indiana bears to the whole length of its lines or routes and, deducting from the amount so ascertained the assessed value for taxation of the real estate and personal property of the defendant in the State of Indiana hereinbefore mentioned, assessed the balance of said sum against the defendant for taxation in the State of Indiana, such balance being for the year 1893 $191,164.75

and for the year 1894 $218,426.25, or at the rate of $175.00 per mile for each mile of its routes in the State, and the taxes sued for are upon said assessments and include taxes assessed against the defendant by virtue of said proceedings and in pursuance of said law in several counties through or across which the defendant's routes extend, but in which the defendant has no property or offices and does no business.

The defendant says that the principal business of all of the express companies affected by said act of March 6, 1893, is interstate commerce, and that the scheme of taxation thereby provided
76 against express companies, while professing to be a tax upon their property, is really an attempt to enforce against them, in contravention of the Constitution of the United States, the payment of a tax for the privilege of carrying on their business, and that the said assessments sued for are not made against this defendant in respect of any property belonging to it in the State of Indiana or subject to the taxing power of said State.

But if said act can be treated as one for the taxation of the defendant's property in the State of Indiana the defendant insists that it is nevertheless in contravention of the provisions of the constitution of the State of Indiana and of the United States hereinbefore mentioned for the following, among other, reasons:

The value of the defendant's shares and of the shares of express companies generally is determined not so much by the value of the property or appliances which they use in carrying on their business as by the skill, diligence, fidelity, and success with which they conduct their business. The defendant employs thousands of men who are constantly engaged in carrying express packages, many of them of great value, from one part of the country to another, and its income and the consequent value of its shares are largely the result of their effort, fidelity, and integrity and of skillful management and supervision of the business. The defendant furthermore owns valuable real estate outside of Indiana, and bonds, stocks, and other securities aggregating millions of dollars, none of which are held or taxable in Indiana at all, all of which, however, together with
77 the company's business connections and the reputation and good will which it has acquired in the course of more than fifty years of public service, as well as its income from business done in the United States outside of Indiana, enter largely into the value of its capital shares.

Nor can the value of the defendant's property in the State of Indiana be ascertained even approximately by applying or considering the proportion which its routes in Indiana bears to the mileage of all its routes, because its earnings are not uniform and in Indiana are less per mile than its earnings in more thickly settled communities and communities of greater business activity and are much less than its average earnings per mile.

Nor does the market price of the defendant's shares afford any fair, reasonable, or just method of estimating the value of its property or fixing a basis of value for purposes of taxation, because the market price is speculative and variable, depending upon financial

and other conditions not at all connected with the company, its business or its property.

The defendant has before the commencement of this suit duly complied with the act of the General Assembly approved March 29, 1879, requiring express companies doing business in the State of Indiana, whether a corporation, individuals, or copartnership, to file a certificate authorizing the commencement of actions against them by service upon their agents in the State.

Second paragraph. That it denies each and every material allegation of said complaint.

78 Third paragraph. That before the bringing of this suit it fully paid all taxes of whatever kind assessed in the State of Indiana for the years 1893 and 1894, except those assumed to be assessed by the State board of tax commissioners of said State of Indiana.

RAMSEY, MAXWELL & RAMSEY AND
BAKER & DANIELS,
Attorneys for Defendant."

79 And the plaintiff now files its motion to strike out and reject the first paragraph of the defendant's answer herein; which motion is in the words and figures following, viz:

"STATE OF INDIANA, } ss:
County of Marion, }

THE STATE OF INDIANA
vs.
THE UNITED STATES EXPRESS CO. } No. 7289. Circuit Court. Motion to Reject, &c.

The plaintiff moves the court to reject and strike from the files the first paragraph of the defendant's answer herein for the following reasons, viz:

a. That so far as the same amounts to the general denial—the general denial being already on file—no question is presented thereby.

b. That so far as the same amounts to a plea of payment—an answer of payment being already on file—no question is presented thereby.

c. That, excluding from the consideration the covenants that might be claimed to amount to the general denial or a plea of payment, no facts are stated or set forth in said first paragraph of answer sufficient to constitute a defense to the said action.

W. A. KETCHAM, *Att'y Gen'l.*

A. G. SMITH,
LEON O. BAILEY AND
MERRILL MOORES,
Of Counsel."

80 "And the court, having heard the argument of counsel upon the said motion to reject and strike from the files the said first paragraph of the defendant's answer herein, now takes the same under advisement."

And afterwards, to wit, on the 2d day of July, 1895, being the 50th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Come again the parties, by counsel, and the court, being fully advised in the premises, now overrules the plaintiff's said motion to strike from the files and reject the first paragraph of the defendant's answer herein; to which ruling of the court the plaintiff at the time excepts, and sixty (60) days are given to prepare and present its bill of exceptions herein.

And thereupon the plaintiff files its demurrer to the first paragraph of the defendant's answer herein in the words and figures following, viz:

"STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA
vs.
THE UNITED STATES EXPRESS CO. } No. 7289. Circuit Court. Demurrer.

81 The plaintiff demurs to the first paragraph of the defendant's answer herein, and for reason therefor says that the said paragraph of answer does not state facts sufficient to constitute a good defense to plaintiff's complaint herein.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY AND
MERRILL MOORES,
Of Counsel."

"And the court, being fully advised in the premises, does now here overrule the said demurrer; to which ruling of the court the plaintiff at the time excepts."

And the plaintiff now files its reply in general denial to the first paragraph of the defendant's answer herein as follows—that is to say:

"STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA
vs.
THE UNITED STATES EXPRESS CO. } No. 7289. Circuit Court. Reply.

The plaintiff, for reply to the first paragraph and also to the third paragraph of the defendant's answer herein, denies each and every allegation therein.

W. A. KETCHAM,
Att'y Gen'l.

A. G. SMITH,
LEON O. BAILEY AND
MERRILL MOORES,
Of Counsel."

82 And afterwards, to wit, on the said 2d day of July, 1895, being the 50th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA		
vs.	No. 7284,	
THE AMERICAN EXPRESS CO.,	No. 7288,	Consolidated.
THE ADAMS EXPRESS CO.,	No. 7289,	
THE UNITED STATES EXPRESS CO.		

Now come the parties to the above-entitled causes, by their respective attorneys, and the said causes being at issue and called for trial, and it appearing to the court that the issues of law and of fact in each of the aforesaid causes are substantially the same, and that the business of the court will be expedited by a consolidation of said causes for hearing and trial at the same time on each one thereof, it is now, by agreement of counsel duly made in open court, ordered that the above-entitled causes be, and they are hereby, consolidated for the purpose of a hearing, finding, trial, and decree.

And thereupon said causes came on for hearing and were
83 submitted to the court. The plaintiff, before entering upon the trial hereof, requested the court to make a special finding of the facts herein and state its conclusions of law thereon.

Now, these consolidated cases are submitted to the court for trial, finding, and judgment without the intervention of a jury, and the court having heard the evidence adduced, the further consideration hereof is now postponed until the 12th day of July, 1895."

And afterwards, to wit, on the 12th day of July, 1895, being the 59th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Comes now the plaintiff, by counsel, and files its bill of exceptions No. 1 herein, which is signed by the court and made a part of the record herein and is as follows, viz:

STATE OF INDIANA, } ss:
Marion County, }

THE STATE OF INDIANA		
vs.	No. 7289.	
THE UNITED STATES EXPRESS CO.,	No. 7284.	Bill of Exceptions No. 1.
THE AMERICAN EXPRESS CO.,	No. 7288.	
THE ADAMS EXPRESS CO.		

84 Be it remembered that heretofore, to wit, on the 2d day of July, 1895, the plaintiff filed its certain motion to reject and strike from the files the first paragraph of the defendants' answer to each of the complaints in said causes, which motion is in these

words and figures" (heretofore inserted in each of the separate transcripts in the cases now consolidated):

"And the court, being sufficiently advised in the premises, overruled the said motions and each of them; to which ruling of the court the plaintiff at the time excepted, and sixty (60) days were allowed to prepare and present its bill of exceptions herein.

And now, on this 12th day of July, 1895, and within the time so allowed by the court, comes the plaintiff, by its attorneys, and tenders this its bill of exceptions No. 1 and prays that the same may be signed, filed, and made a part of the record in this cause, which is now done.

EDGAR A. BROWN, *Judge.*"

"And come now the parties, by counsel, and the trial of this cause is resumed, and, the evidence having been concluded and part of the argument had, the further consideration hereof is postponed until tomorrow morning at nine o'clock."

85 And afterwards, to wit, on the 13th day of July, 1895, being the 60th judicial day of the May term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

"Come again the parties, by counsel, and the argument hereof is resumed, and, the same having been concluded, the court now takes this cause under advisement."

And afterwards, to wit, on the 4th day of September, 1895, being the 3d judicial day of the September term, 1895, of said court, before the same honorable judge, the following proceedings were had herein, viz:

Special Finding of Facts and the Conclusion of Law Thereon.

86 STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Circuit Court, September Term, 1895.

STATE OF INDIANA *vs.* THE AMERICAN EXPRESS COMPANY.	No. 7284.	As Consolidated by Order of Court.
STATE OF INDIANA *vs.* THE ADAMS EXPRESS COMPANY.	No. 7288.	
STATE OF INDIANA *vs.* THE UNITED STATES EXPRESS CO.	No. 7289.	

Special Finding of Facts.

The court, having been duly requested by the plaintiff before entering upon the trial to make a special finding of facts and

86½–116 state its conclusions of law thereon, does find the facts specially as follows:

First. Said defendants and each of them were at and prior to the 1st day of April, 1893, and ever since have been joint stock associations organized and acting under the laws of the State of New York and engaged in conveying to, from, through, in, and across the State of Indiana and parts thereof money, packages, gold, silver, plate, merchandise, freight, and other articles under contracts with railroad companies operating in the State of Indiana, such associations nor either of them being a railroad company; and each of said associations was at and prior to the 1st day of April, 1893, an express company, the articles of association of the American Express Company being as follows:

(Here follow copies of the articles of association of each of the defendants.)

* * * * * * *

117 Second. The Adams Express Company, by proper contracts made with the Pennsylvania Company, the Chicago, St. Louis & Pittsburgh Railway Company, and the Pittsburgh, Chicago & St. Louis Railway Company, had at and prior to the first day of April, 1893, and ever since the exclusive right to transport express matter over the lines known as the Pennsylvania Company lines within the State of Indiana. The American Express Company, under similar contracts, had the exclusive right to transport express matter over the lines of the Louisville, New Albany & Chicago Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company within the State of Indiana, and the United States Express Company had, under similar contracts, the exclusive right of carrying express matter over the lines of the Lake Erie & Western and other railroads in the State of Indiana.

Third. On the first day of April, 1893, for a long time prior thereto, and ever since said defendants have each been engaged in carrying on business as express companies and common carriers of express matter within the State of Indiana, operating different routes over which its express matter was carried into,

118 across, and through the States and parts thereof.

Fourth. During the year 1893 said defendants and each of them, respectively, under protest, made and filed with the auditor of state of the State of Indiana their certain statement and report as provided by section three of the act of March 6, 1893, verified by oath of the officer or agent of said defendants respectively, showing the total capital of such association, the manner in which the capital thereof was divided and such holdings were evidenced, together with the par value of each share, showing also its principal place of business and the market value of said shares on the first day of April, 1893 and 1894, respectively; showing also the real estate, fixtures, property, and appliances owned by each of said associations respectively and subject to local taxation within the State of Indiana and the location and assessed value thereof in each county in the State where the same was assessed for local taxa-

tion; showing also the total length of the lines or routes over which such association transported merchandise, freight, and express matter, the total length of such lines and routes outside of the State of Indiana, and the total length of such lines and
119–132 routes within each of the counties within the State of Indiana.

Fifth. Upon the meeting of the State board of tax commissioners of the State of Indiana in the years of 1893 and 1894, respectively, for the purpose of assessing railroad and other property the auditor of State laid before the State board of tax commissioners such statements of said companies, respectively, and thereupon said State board of tax commissioners proceeded, under the act of March 6, 1893, to assess the said defendants and each of them; and said State board of tax commissioners did ascertain and determine the number of miles of route of the said several associations of each of the counties of the State through, into, or across which each of them or either of them operated its routes; and said board did assess the Adams Express Company and also the defendant The American Express Company at the amount of $250.00 per mile of each and every mile so operated by it and the defendant The United States Express Company at the sum of $175.00 per mile of each and every mile so operated by it for the years 1893 and 1894; and said board did ascertain and assess and fix the mileage of said several defendants in said several counties in the State as follows:

222 For the year 1893, to the American Express Company:

In the county of Bartholomew .....14 miles.
In the county of Benton.....42 miles.

(Here follow the various other counties and the mileage of the American Express Company in each, during the year 1893.)

And in like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The American Express Company, in the several counties in this State, as follows:

In the county of Bartholomew .....14 miles.
In the county of Benton.....42 miles.

(Here follow the other counties and mileage.)

And said board did in like manner ascertain, assess and fix the mileage of the defendant, The Adams Express Company, in said several counties in the State, for the year 1893, as follows:

In the county of Adams.....23 miles.
In the county of Allen .....61 miles.

(Here follow the other counties and mileage.)

In like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The Adams Express Company, in the several counties in the State, for the year 1894, as follows:

In the county of Adams.....26 miles.
In the county of Allen.....61 miles.

(Here follow the other counties and mileage.)

And said board did in like manner ascertain, assess and fix the mileage of the defendant, The United States Express Company, in said several counties within the State, for the year 1893, as follows:

In the county of Allen.....27 miles.
In the county of Benton.....21 miles.

(Here follow the other counties and mileage.)

And in like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The United States Express Company, within the several counties in the State, for the year 1894, as follows:

In the county of Allen.....25.33 miles.
In the county of Benton.....23.34 miles.

(Here follow the other counties and mileage.)

223 Sixth. The rate of taxation in the several counties for the years 1893 and 1894, upon the one hundred dollars, was as follows:

	1893.	1894.
In the county of Adams	$1 47	$2 34
In the county of Allen	1 40	2 02

(And so on for all the counties.)

133–160 Seventh. Upon the completion of said assessment by said State board of tax commissioners the result thereof was by said board certified to the auditor of State, and said auditor of State did thereupon certify the same to the auditors respectively of the several counties through, into, over, or across which the lines or routes of said association extended, and said several auditors thereupon apportioned the amounts so certified for their counties respectively among the several townships into, over, through, or across which their lines or routes extended in proportion to the length of the lines in such township, such action by said State board of tax commissioners and by said auditor of State and by said county auditors having been had with reference to the taxation and assessment of the several defendants hereto, both in the year 1893 and in the year 1894.

* * * * * * *

223 Eighth. Upon the assessment so made by said State board of tax commissioners, and so certified to the auditor of State, and by him so certified to the several county auditors, there *was* assessed against the said several defendants, in addition to the assessments made of their property subject to local taxation by the local authorities, the following sums and amounts in the various counties within the State against the defendants as follows:

For the year 1893:

In the county of Adams against the defendant, The Adams Express Company, the sum of	$84 52
In the county of Allen against the Adams Express Company, the sum of	213 50
In the county of Allen against the United States Express Company, the sum of	66 15

(And so on, the assessments in each of the counties against each of the defendant companies for 1893.)

For the year 1894:

In the county of Adams against the defendant, The Adams Express Company, the sum of	$152 10
In the county of Allen against the Adams Express Company, the sum of	308 05
In the county of Allen against the United States Express Company the sum of	89 54

(And so on, the assessments in each of the several counties against each of the defendant companies for 1894.)

161 Ninth. That said defendants and each of them have paid the taxes assessed against the property subject to local taxation in full, but have paid no part or portion of the taxes assessed against them or either of them on the assessment so made by said State board of tax commissioners and certified to the auditor of State and by him certified to the auditors of the several counties, and that the aggregate amount- of the taxes so assessed throughout the various counties in the State of Indiana against the said several defendants and each of them, exclusive of any penalties, interest, costs, or other charges of any kind, character, or description that remained, no portion of which was ever paid or tendered by said defendants or either of them, were and are as follows:

Against the Adams Express Company for the year 1893 the sum of	$8,858 44
For the year 1894 the sum of	8,951 02
Against the American Express Company for the year 1893 the sum of	7,542 63
For the year 1894 the sum of	7,573 02
Against the United States Express Company for the year 1893 the sum of	3,010 17
For the year 1894 the sum of	3,558 98

162 Tenth. The defendants assigned the messengers' safes used by them on through routes to the office of the residence of the messenger and returned them for taxation from that office, and there were so used by the defendant The American Express Company, in the years 1893 and 1894, upon through routes crossing the State of Indiana, six (6) safes on the route between Cincinnati and Chicago and six (6) on the route between St. Louis and Cleveland,

which, together with the chair and lamp of the messenger used upon said route, were not returned to the local authorities for taxation in the State of Indiana.

The defendants had no property in the State of Indiana during said years except said messengers' safes, lamps, and chairs so used on through routes and the local properties assessed by the local officers.

163 Eleventh. The defendants and each of them, conceding the correctness of the tax made by the local authorities upon the properties so returned to them, have paid all the taxes assessed against their property subject to local taxation by the local authorities, but, denying the validity of the assessment by the State board of tax commissioners against them or either of them on account of their routes, have refused to pay the taxes or any portion thereof assessed by the State board of tax commissioners, and all of such taxes so due upon such assessment so made by said State board of tax commissioners remains wholly unpaid.

164 From the foregoing facts the court states as its conclusions of law that the plaintiff ought not to recover anything in this action from the defendants or either of them.

EDGAR A. BROWN, *Judge.*"

165 To which said conclusion of law upon the facts so specially found the plaintiff at the time excepts, and prays that this its exception be now spread of record, which is ordered and done accordingly.

And now the plaintiff files its separate motion for a new trial as to the defendant The "American Express Company," and also files its separate motion for a new trial as to the defendant "The Adams Express Company," and also files its separate motion for a new trial as to the defendant "The United States Express Company," and also files its separate motion for a new trial as to the defendants and each of them upon said consolidation; which said motion is as follows, viz:

"STATE OF INDIANA, } *ss:*
County of Marion, }

THE STATE OF INDIANA		
vs.		
THE AMERICAN EXPRESS CO.,	No. 7284,	Consolidated.
THE ADAMS EXPRESS CO.,	No. 7288,	
THE UNITED STATES EXPRESS CO.	No. 7289,	

Motion for New Trial as to All of said Defendants.

166 The plaintiff moves the court to set aside the finding and decision of the court and grant it a new trial herein as to the defendants, The American Express Company, The Adams Express Company, and The United States Express Company, and each of them, and assigns the following reasons therefor:

First. That the decision and finding of the court is not sustained by sufficient evidence.

Second. That the decision and finding of the court is contrary to law.

Third. That there were errors of law occurring at the trial of said causes which were excepted to by the plaintiff at the time in this, viz:

a. That the court erred in admitting in evidence the articles of association of "The American Express Company."

b. That the court erred in admitting in evidence the articles of association of "The Adams Express Company."

c. That the court erred in admitting in evidence the articles of association of "The United States Express Company."

d. That the court erred in permitting the witness Hughes, while being examined as a witness on behalf of the defendants, to be asked and in permitting him to answer the question as to the method that the express companies adopt for collecting, transfer-ing, and
167 delivering their packages, especially in the State of Indiana, with a view to ascertain what, if any, property express companies have in the State.

e. That the court erred in permitting the witness Hughes, while being examined as a witness for the defendants, to be asked and to answer the question what property in the State of Indiana, other than the horses, wagons, and push-carts referred to in the said question, the companies owned.

W. A. KETCHAM,
Attorney General.

A. G. SMITH,
LEON O. BAILEY AND
MERRILL MOORES,
Of Counsel."

And the court, being sufficiently advised in the premises, overrules said motions for a new trial and each of them; to which ruling and action of the court upon said motions and each of them separately the said plaintiff at the time excepts.

And the court now, upon its conclusion of law on the facts so specially found as aforesaid, orders that judgment be entered in favor of the said several defendants and each of them in said action so consolidated as aforesaid.

It is therefore considered and adjudged by the court that
168 the said plaintiff take nothing by its actions against said defendants or either of them, and that said defendants and each of them go hence without day; to which ruling, order, and judgment of the court as to the said defendants in said consolidated action and as to each of them the plaintiff at the time excepts.

All of which is finally considered, ordered, and adjudged by the court.

EDGAR A. BROWN, *Judge.*"

"And now the plaintiff prays an appeal to the supreme court of the State of Indiana in said consolidated causes and each of them, which prayer is granted by the court."

And afterwards, to wit, on the 14th day of September 1895, being the 12th judicial day of the September term, 1895, of said court, before the same hon. judge, the following proceedings were had herein—that is to say:

Comes now the plaintiff, by counsel, and tenders to the court its bill of exceptions number 2, in said consolidated cases 7284, 7288, and 7289, embodying the stenographer's long-hand manu-
169 script verbatim official report of the evidence adduced, rulings made, exceptions noted, &c, on the trial of the said consolidated causes, which bill of exceptions No. 2 is now signed by the court, ordered to be filed and made a part of the record in said causes, and is in the words and figures following, viz:

(MEMO.—Said bill of exceptions No. 2 is not in my office, having been certified to the supreme court of the State of Indiana as part of the transcript in the appeal thereto, pursuant to section 1410, Revised Statutes of Indiana of 1881.)

JAMES W. FESLER,
Clerk of the Circuit Court of Marion County, Indiana.)

And afterwards, to wit, on the 29th day of January, A. D. 1896, being the 21st judicial day of the January term, 1896, of said court, before the same honorable judge, the following proceedings were had herein, viz:

170 In the Marion Circuit Court.

THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY *et al.*, Consolidated. } No. 7289.

Come now the parties and upon motion of the plaintiff the opinion of the supreme court is now ordered spread of record in the words and figures following, to wit:

171 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1895.

On the 21st day of December, 1895, being the 24th judicial day of said November term, 1895.

Hon. Leonard J. Hackney, chief justice; Hon. James H. Jordan, Hon. Leander J. Monks, Hon. James McCabe, Hon. Timothy E. Howard, judges.

In the case of—

STATE OF INDIANA
vs.
ADAMS EXPRESS COMPANY *et al.* } 17745. Appeal from the Marion Circuit Court.

Came the parties, by their attorneys, and the court, being sufficiently advised in the premises, gave the following opinion and judgment pronounced by McCabe, J.:

172 The appellant, The State of Indiana, sued each of the above-named express companies in the Marion circuit court to recover certain taxes alleged to have been assessed and levied on the property of said several companies within this State by the State board of tax commissioners. The right to maintain such suit at the election of the attorney general of the State is conferred by section 11 of the act of March 6th, 1893, supplementary to the general tax law of 1891. Acts 1893, p. 381, R. S., sec. 8488. The same questions of law were involved in each case, and the questions of fact involved in each were so very similar that the three cases, after separate issues had been joined in each, were, by agreement of both parties, by order of the trial court, consolidated for the convenience of all in the trial

On proper request, the trial court trying the cases without a jury made a special finding of the facts in all particulars; where such facts were not exactly alike in all the cases, they were found in such a manner as to make them readily applicable to the proper case. One conclusion of law is stated which is alike applicable to each case, and that conclusion is "that plaintiff ought not to recover anything in this action from the defendants or either of them."

The findings show that each of said companies made a report to the auditor of State under protest required by section 3 of said act (R. S. 1894, sec. 8480), verified by an officer or agent of such companies, of the total capital stock, the number of shares of such capital stock issued and outstanding, with par value of each, the principal place of business which was in each case outside of this State, the market value of said shares on the first day of April next preceding, the real estate, structures, machinery, fixtures, and appliances owned by each and subject to local taxation within the State of Indiana, the location and assessed value thereof in each county or township where the same is assessed for local taxation, the specific real estate, together with the improvements thereon, owned by each of said companies situate outside of the State of Indiana and not used in the business, with a specicie description of each piece, where located, the purpose for which the same is used, and the sum at

173 which the same is assessed for taxation in the locality where situated; all mortgages upon the whole or any part of the property of each, together with the dates and amounts thereof; the total length of lines or routes over which they transport merchandise, freight, or express matter; the total length of such lines or routes as are outside of the State of Indiana, of each; the length of such lines or routes of each within each of the counties and townships within the State of Indiana.

That the auditor of State, as required by sec. 6 of said act (R. S., 1894, sec. 8483), laid each of said reports or statements before the State board of tax commissioners when they met for the purpose of assessing railroad and other property.

It is also found that each of said companies had contracts with certain railroads named by which the exclusive right to transport express matter over such lines of the railroads over which the route of each

extended in such a manner that no two or more companies could transport such express matter over the same line or route or any part thereof in the State of Indiana.

That upon the presentation of said reports or statements of said companies respectively to the State board of tax commissioners they proceeded to value and assess the property of each of said companies for the years 1893 and 1894 respectively. They proceeded, as we construe the finding, as they were required to proceed by the act mentioned, having first ascertained the number of miles of route of each in this State from said statements and assessed the Adams Express Company and the American Express Company each at the amount of $250.00 and the United States at the sum of $175.00 per mile of their route respectively in this State for said years.

The court finds the number of miles of each of said routes in this State respectively; that such assessment was certified to the auditor of State as required by the act, and he, in like manner, had certified to the several county auditors, who also had fully complied with the requirements of the act in relation to such assessments.

It is further found that each of the defendants has paid the taxes assessed against the property of each subject to local taxation, but that neither of them has paid any part or portion of the taxes so assessed against them or either of them by the State board of tax commissioners.

The objection to the payment of such tax by the appellees cannot be better stated than in the plausible and persuasive language of
174 their learned counsel, as follows: "Briefly stated, the defense is that the assessments sued for are not made in respect of any property belonging to the defendants in the State of Indiana or subject to the taxing power of the State. It is admitted by the attorney general that the defendants were assessed in 1893 and 1894 for State, county, municipal, and other purposes upon all their property in the State subject to local taxation, and that they had paid all such assessments. The further tax now sued is for a tax of $250.00 per mile against the American and Adams, and $175.00 against the United States Express Companies upon each mile of their routes in the State of Indiana. We contend that the 'route' of an express company, which owns neither the road nor cars over which it does business, is not property."

If the assumption of fact contained in the proposition of counsel were well founded we should find it difficult to resist the legal conclusion sought to be drawn therefrom.

We agree with appellee's counsel that the assessment of the tax must be made and levied upon actual property, and that property must be within the State of Indiana, nor can the State call something property that is not property and tax a person or corporation or copartnership thereon as property.

To do so in relation to these appellees who are engaged in interstate commerce would violate the Federal Constitution. Fargo *vs.*

Michigan, 121 U. S., 230; Philadelphia *vs.* Southern Steamship Co. *vs.* Pennsylvania, 122 U. S., 336.

But it is conceded that the State board of tax commissioners is shown to have proceeded in exact accordance with the provisions of the act in question, the 7th section of which (R. S. 1894, sec. 8484) provides, after the presentation of the statements by said companies already mentioned and required by a previous section to the State board of tax commissioners, that "said * * * board * * * shall first ascertain the true cash value of the entire property owned by said * * * company * * * from said statements or otherwise, for that purpose taking the aggregate value of the capital stock. * * *

"Such board of tax commissioners shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain from such statements or otherwise the
175 value for taxation in the localities where the same is situated of the several pieces of real estate situate without the State of Indiana and not specially used in the general business of such * * * companies * * * which said assessed values for taxation shall be by said board deducted from the gross value of the property thus ascertained. Said board * * * shall next ascertain the true cash value of the property of such companies * * * within the State of Indiana by taking the proportion of the whole aggregate value of said * * * companies, * * * as above ascertained, after deducting the assessed value of such real estate without the State, * * * the proportion of the whole aggregate value after such deductions which the length of the lines or routes within the State of Indiana bears to the whole length of the lines or routes of such * * * companies * * * and such amount so ascertained shall be deemed and held as the entire value of the property of said * * * companies * * * within the State of Indiana. From the entire value of the property so ascertained there shall be deducted by the said board the assessed value for taxation of all the real estate, structures, machinery, and appliances within the State and subject to local taxation in the counties and townships as hereinbefore described in item 5 of sections 1, 2, 2, 3, and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association."

It is very clear, we think, if the board followed this statute, and it is practically conceded by the appellee that the finding shows that to be the case, that their entire assessment was every particle of it on actual property and not on a myth or wind or air or sunshine, and it was property within the State of Indiana. Their assessment was on all the property in the several counties in the State subject to local taxation, which, for the purpose of arriving at its true and actual value, must, as the legislature has wisely provided, be united with all the property owned and used by the company in the prosecution of its business in whatever State situate. It is but reasonable that when such property is broken into fragments and the several parts are disconnected not only is the unit

destroyed, but the several fragments separated from the united system to which they belonged and in which they each serve an important purpose in the one connected and harmonious system,
176 the proportionate value of each when thus separated may be greatly reduced.

To avoid this great destruction of values the act in question authorizes the system of valuation known as the unit system of valuation—that is, by valuing the whole property employed in any one of the peculiar classes of business named in the act into whatever number of States that property or parts thereof may be carried and used in the prosecution of such business, and then by the use of the means and methods authorized by the act apportioning to Indiana its fair proportion of the whole value according to the proportion of the whole property used in this State.

The length of the routes is required to be stated as one means of arriving at the true value of the property, because common sense and general knowledge teach that the length of a route such as those involved here has a direct bearing upon the earning capacity of the property employed in the business, and the earning capacity of a property has a direct bearing upon its true value.

So that we see that it is not true that the assessment of so much per mile on the whole number of miles of the route of each company in this State was made on a myth; that the appellees' claim that such assessment was not made in respect to any property belonging to them in the State of Indiana is wholly unfounded in fact or law. On the contrary, it was made upon that portion of the whole property belonging to each of the companies that was used in the prosecution of their business in the State of Indiana, and its value was fixed and ascertained by apportioning such a part of the value of the whole property as the portion thereof in this State bore to the whole property.

Appellees' learned counsel seem to suppose that because the board did, as authorized and required by the statute quoted, deduct from the gross amount of their assessment the assessed value for taxation of the local properties in the several counties and townships of this State as fixed by the local assessing officers therefore, the remainder constituting their assessment certified to the State auditor is not an assessment on such local properties; but that is a grave mistake of both law and fact. The very object of the unit system of assessment is to prevent the destruction of values by disruption and
177 disintegration. Therefore the whole property used in the business is first valued and necessarily that included all the local properties in this State, and then so much of the whole value thus ascertained is apportioned to Indiana as its amount and value bears to the amount and value of the whole property.

This sy-tem of valuation has been directly upheld by this and other courts to the fullest extent in—

Western Union Tel. Co. *vs.* Taggart, Ind. (40 N. E., 1051).
Western Union Tel. Co. *vs.* Henderson, 68 Fed., 589.
Western Union Tel. Co. *vs.* Attorney General, 125 U. S., 530.
Massachusetts *vs.* Western Union Tel. Co., 141 U. S., 40.

Pullman Palace Car Co. *vs.* Hayward, 141 U. S., 36.
P., C., C. & St. L. R'y Co. *vs.* Backus, treas., 133 Ind., 625.
Same *vs.* Same, 154 U. S., 421.
C., C., C. & St. L. R'y Co. *vs.* Backus, 154 U. S., 439.

But it is insisted by the learned counsel for the appellees that there is a marked distinction between these cases and the case at bar; that these cases upheld the assessments because they were based on tangible property such as the actual physical telegraph lines, including poles and wires, in the telegraph cases, and the right of way, rails, ties, rolling stock, &c., in the railroad cases; and it is further urged that the suggestion of the attorney general that the contract of the express companies with railroad companies might be treated as property that could be taxed against the express companies is not tenable to support the assessments, because they are not and do not purport to be assessments of the value of any such contracts and the act does not provide for bringing them before the State board or for having the board estimate their value.

While it may be conceded that this contention as to such contracts ought to be upheld, yet such contracts do serve an important purpose in the whole investigation before the board. They established a direct connection of all the property, unity, and fixity of routes or lines on which such property of the given company was used in the prosecution of their business, and thus established its united character. It may have been that the purpose for which the property was used would have been sufficient to establish
178 its unit character, but the contracts mentioned put that beyond cavil.

And it was the property thus brought into oneness that was assessed and valued, and the proper part of that assessed value was apportioned to Indiana.

While the court found that the defendants had no property in Indiana during the years 1893 and 1894 except certain messengers' safes used on through routes and the local properties assessed by the local officers, it did not find that this whole property had not been assessed and valued, but, on the contrary, the whole finding shows that it had been so assessed and valued according to the method and means prescribed in the act for ascertaining its true value.

Just such an assessment under a statute in all material respects exactly like ours was upheld by the supreme court of Ohio in State *ex rel.* Poe, State auditor, *vs.* Jones, county auditor, Ohio (37 N. E., 945); also by the circuit court of the United States for the southern district of Ohio in Adams Express Co. *vs.* Poe, State auditor, *et al.*, 64 Fed. R., 9, and by the United States circuit court of appeals for the sixth circuit in Sanford *vs.* Poe *et al.*, two cases, and Fargo *vs.* same, 69 Fed. Rep., 546.

An attempt is made to distinguish these cases from the case at bar by the learned counsel for appellees. They accordingly insisted that there was but one statute for the taxation of the property of express companies in Ohio, while there are two here; but that is a

mistake. The act of March 6th, 1893, is supplemental and amendatory to that of March 6th, 1891, and therefore must be construed as a part of that act. Western Union Tel. Co. *vs.* Taggart, *supra*.

The local properties of such companies are subject to taxation in the localities where they are situate by the former act, but the two acts must be construed as one and the same act. Western Union Tel. Co. *vs.* Taggart, *supra*. So that we have a statute authorizing the local properties of such companies to be assessed for taxation by the local taxing officers where such properties are situate in their disintegrated and fragmentary condition, wholly disconnected from the harmonious whole to which they belong, and because that may not be their real and true value the same statute authorizes the whole to be brought together and valued as a unit, and to the
179 end that such localities may not be deprived of their local rights in the taxation of such property the amount of such local assessments is to be deducted from the whole value of it shall show an increase of valuation by uniting the whole for valuation. That at the same time avoids the injustice of double taxation.

There is no complaint here that the assessment was too high, but the complaint is confined solely to the objection that the assessment is not on property. This, we think, we have shown is not true either as a matter of law or fact. It is not surprising that the increase in the burdens of taxation brought about by the act in question on the property of such companies should arouse complaints. Hitherto such companies for want of proper legislation have well nigh escaped taxation in this State. It is but natural that the taxgatherer should be made an unwelcome visitor by many good people; but the good citizen should take comfort in the payment of his taxes when reminded that it is such payment that enables the majesty of the law to walk by his side and shield and protect him against the lawless and violent both day and night in the enjoyment of his life, liberty, and property.

So, too, these appellees have great need of such protection, and ought to contribute their just share to support the Government that affords it. The law, with sword and buckler, goes with their agents in their perilous journeyings throughout the State by day like a pillar of cloud and by night like a pillar of fire to guard the valuable treasurers and precious freight they transport for hire from burglars and robbers.

We are of opinion that the circuit court erred in its conclusions of law.

The judgment is reversed and the cause remanded, with instructions to restate the conclusions of law in accordance with this opinion, namely, that the plaintiff is entitled to recover in each case the amount of tax assessed against each appellee by the State board of tax commissioners as found by the court and fifty per cent. penalty thereon in each case, and that each of the judgments to be rendered upon such conclusion of law bear interest at the rate of six per cent. per annum from the date of the finding, and the court is instructed to render judgment accordingly.

180 The State of Indiana Supreme Court.

I, Alexander Hess, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion of said court in the above-entitled cause.

Seal Supreme Court, State of Indiana.

In witness whereof I hereto set my hand and affix the seal of said court, at the city of Indianapolis, this 23d day of December, 1895.

ALEX. HESS, *C. S. C.*

181 [Endorsed:] In the supreme court, —— term, 189–. —— —— *vs.* —— ——. Certified copy of opinion. Alexander Hess, clerk supreme court.

182 And thereupon the plaintiff files its written motion to restate the conclusions of law herein in accordance with the opinion of the supreme court and to enter judgment thereon as of the 4th day of Sept., 1895, said motion being in the words and figures following, to wit:

183 In the Marion Circuit Court.

THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY *et al.*, Consolidated. } No. 7289.

Motion to Restate Conclusions of Law and to Enter Judgment in Accordance Therewith.

The plaintiff shows the court, by reference to the opinion of the supreme court filed herein and spread of record in this cause, that the conclusions of law should be restated, and therefore moves the court to restate its conclusions of law as follows:

I. That the plaintiff is entitled to have and recover of the defendant The Adams Express Company, as and for the taxes for the year 1893, the sum of $8,858.44, with sixteen per cent. penalty thereon, by reason of the failure of said defendant to pay the taxes assessed or the first installment thereof on or before the third Monday of April, 1894, and by reason of its continued refusal to pay said taxes on or before the first Monday of Nov., 1894, the amount of such recovery and said penalties aggregating the sum of $10,275.79.

II. Said plaintiff is entitled to recover of the defendant The Adams Express Company, as and for the taxes for the year 1894, the sum of $8,951.02, together with ten per cent. penalty thereon, by reason of its failure to pay said taxes and the first installment thereof on or before the third Monday in April, 1895, said sum, with said penalty, amounting in the aggregate to the sum of $9,846.12.

III. That said plaintiff is entitled to recover of said de-
184 fendant, The Adams Express Co., in addition thereto, a penalty of fifty per centum upon the aggregate amounts due as above stated, the whole amount of the recovery of plaintiff from

said defendant, The Adams Express Company, being the sum of $30,182.87, including all penalties.

IV. That judgment should be now entered as of the 4th day of Sept., 1895, against said Adams Express Company for said sum of $30,182.87 and all costs, said judgment to bear interest at the rate of 6 per cent. per annum from and after the 4th day of Sept., 1895.

V. That said plaintiff is entitled to have and recover of the defendant The American Express Company, as and for the taxes for the year 1893, the sum of $7,542.63, with sixteen per cent. penalty thereon, by reason of its failure to pay the taxes assessed or the first installment thereof on or before the third Monday in April, 1894, and by reason of its continued refusal to pay said taxes on or before the first Monday in November, 1894, the amount of such recovery and said penalties aggregating the sum of $8,749.45.

VI. Said plaintiff is entitled to recover of the defendant The American Express Company, as and for the taxes for the year 1894, the sum of $7,573.02, together with ten per cent. penalty thereon, by reason of its failure to pay said taxes and the first installment thereof on or before the third Monday in April, 1894, said sum, with said penalty, amounting in the aggregate to the sum of $8,330.32.

VII. That said plaintiff is entitled to recover of said defendant, The American Express Company, in addition thereto, a penalty of fifty per centum upon the aggregate amounts due as above stated, the whole amount of the recovery of plaintiff from said defendant, The American Express Company, being the sum of $25,619.66, including all penalties.

185 VIII. That judgment should be now entered as of the 4th day of Sept., 1895, against the said American Express Company for said sum of $25,619.66 and all costs, said judgment to bear interest at the rate of 6 per cent. per annum from and after the 4th day of September, 1895.

IX. That said plaintiff is entitled to have and recover of the defendant The United States Express Company as and for the taxes for the year 1893 the sum of $3,010.17, with sixteen per cent. penalty thereon by reason of *its* failure of said defendant to pay the taxes assessed or the first installment thereof on or before the third Monday in April, 1894, and by reason of its continued refusal to pay said taxes on or before the first Monday in Nov., 1894, the amount of such recovery and said penalties aggregating the sum of $3,491.80.

X. Said plaintiff is entitled to recover of the defendant The United States Express Company as and for the taxes for the year 1894 the sum of $3,558.98, together with ten per cent. penalty thereon, by reason of its failure to pay said taxes and the first installment thereof on or before the third Monday in April, 1894, said sum, with said penalty, amounting in the aggregate to the sum of $3,914.88.

XI. That said plaintiff is entitled to recover of said defendant, The United States Express Company, in addition thereto a penalty of fifty per centum upon the aggregate amounts due as above stated, the whole amount of the recovery of plaintiff from said defendant,

The United Express Company, being the sum of $11,110.02, including all penalties.

XII. That judgment should now be entered as of the 4th day of Sept., 1895, against the said United States Express Company for said sum of $11,110.02 and all costs, said judgment to bear interest at the rate of 6 per cent. per annum from and after the 4th
186 day of Sept., 1895.

And plaintiff also moves the court upon such conclusions of law to render judgment in favor of the plaintiff against the Adams Express Company as of the 4th day of Sept., 1895, for said sum of $30,182.87.

And against the American Express Company as of the 4th day of Sept., 1895, for the sum of $25,619.66.

And against the United States Express Company as of the 4th day of Sept., 1895, for the sum of $11,110.02, each and every of said judgments to bear interest from and after the 4th day of Sept., 1895, at the rate of 6 per cent. per annum.

WILLIAM A. KETCHAM,
Att'y Gen'l.

ALONZO GREENE SMITH,
MERRILL MOORES,
LEON O. BAILEY,
Of Counsel.

187 And the court, having considered said motion and being fully advised in the premises, does now sustain the same in so far as it asks the rendition of the judgment for the amount due the State under the conclusions of law hereinafter stated, and that the judgment should be entered as of the 4th day of Sept., 1895, but overrules said motion in so far as it asks that conclusions of law should be stated allowing penalties other than the fifty per cent. penalty named; to which ruling and action of the court upon said motion the said plaintiff at the time excepts and thirty days' time is allowed to file a bill of exceptions, and thereupon the court restates its conclusions of law as follows:

1. That the plaintiff is entitled to have and recover of the defendant The Adams Express Company as and for the taxes sued for for the year 1893 the sum of $8,858.44, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

2. That the plaintiff is entitled to recover of the defendant The Adams Express Company as and for the taxes sued for for the year 1894 the sum of $8,951.02, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

3. That said plaintiff is entitled to recover of said defendant, The Adams Express Company, in addition to the sums above named a penalty of fifty per cent. upon the aggregate amounts due as above stated for and on account of the taxes sued for for the years 1893 and 1894, the whole amount of the recovery of plaintiff from said defendant, The Adams Express Company, being the sum of $26,714.19.

4. That judgment should be now entered as of the 4th day of

Sept., 1895, against said Adams Express Company for said sum of $26,714.19 and all costs; said judgment to bear interest at
188 the rate of 6 per cent. per annum from and after the 4th day of Sept., 1895.

5. That the plaintiff is entitled to have and recover of the defendant The American Express Company as and for the taxes sued for for the year 1893 the sum of $7,542.63, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

6. That the plaintiff is entitled to recover of the defendant The American Express Company as and for the taxes sued for for the year 1894 the sum of $7,573.02, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

7. That said plaintiff is entitled to recover of said defendant, The American Express Company, in addition to the sums above named a penalty of fifty per cent. upon the aggregate amounts due as above stated for and on account of the taxes sued for for the years 1893 and 1894, the whole amount of the recovery of plaintiff from said defendant, The American Express Company, being the sum of $22,673.47.

8. That judgment should be now entered as of the 4th day of Sept., 1895, against the American Express Company for said sum of $22,673.47 and all costs; said judgment to bear interest at the rate of 6 per cent. per annum from and after the 4th day of Sept., 1895.

9. That the plaintiff is entitled to have and recover of the defendant The United States Express Company as and for the taxes sued for for the year 1893 the sum of $3,010.17, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

189 10. That the plaintiff is entitled to recover of the defendant The United States Express Company as and for the taxes sued for for the year 1894 the sum of $3,558.98, but without penalty except as to the fifty per cent. penalty hereinafter set forth.

11. That said plaintiff is entitled to recover of said defendant, The United States Express Company, in addition to the sums above named a penalty of fifty per cent. upon the aggregate amounts due, as above stated, for and on account of the taxes for the years 1893 and 1894, the whole amount of the recovery of plaintiff from said defendant, The United States Express Company, being the sum of $9,853.73.

12. That judgment should be now entered as of the 4th day of Sept., 1895, against the United States Express Company for said sum of $9,853.73 and all costs; said judgment to bear interest at the rate of 6 per cent. per annum from and after the 4th day of Sept., 1895.

To the first, second, third, and fourth of which conclusions of law respectively and severally the said defendant, The Adams Express Company, now and at the proper time duly excepts.

To the fifth, sixth, seventh, and eighth of which conclusions of law respectively and severally the said defendant, The American Express Company, now and at the proper time duly excepts.

To the ninth, tenth, eleventh, and twelfth of which conclusions of law respectively and severally the said defendant, The United States Express Company, now and at the proper time duly excepts, and to each of which said conclusions of law and each and every of them separately and severally the said plaintiff at the time excepts and asks that these its exceptions be spread of record, which
190 is now done accordingly; and thereupon the court upon such conclusions of law enters judgment in favor of the plaintiff and against said several defendants as follows:

It is therefore considered and adjudged by the court that the plaintiff do have and recover as of the 4th day of Sept., 1895, of the defendant The Adams Express Company the sum of $26,714.19, together with all costs and charges laid out and expended, taxed at $——, to which said defendant, The Adams Express Company, now and at the proper time duly excepts.

It is further considered and adjudged by the court that the plaintiff do have and recover of the defendant The American Express Company, as of the 4th day of Sept., 1895, the sum of $22,673.47, together with all costs and charges in that behalf laid out and expended, taxed at —— dollars, to which said defendant, The American Express Company, now and at the proper time duly excepts.

It is further considered and adjudged by the court that the plaintiff do have and recover as of the 4th day of Sept., 1895, of the defendant The United States Express Company the sum of $9,853.73, together with all costs and charges in that behalf laid out and expended, taxed at —— dollars, to which said defendant, The United States Express Company, now and at the proper time duly excepts.

That each and every of said judgments so rendered to bear interest from and after the 4th day of Sept., 1895, at the rate of 6 per cent. per annum, to which said defendants severally now and at the proper time duly except.

It is further considered and adjudged by the court that as between themselves the defendants shall respectively pay one-third of the costs accruing herein from and after the consolidation of the cases heretofore ordered, each party paying his separate costs prior to said consolidation and the costs hereafter accruing, all of which is finally considered and adjudged, to which said defendants severally now, at the proper time, duly except.

And thereupon the plaintiff files its motion in writing to modify, amend, and correct the several conclusions of law and the judgment of the court thereon in the words and figures following,
191 to wit:

192 THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY *et al.* } No. 7289. Consolidated.

Motion to Amend, Modify, and Correct the Conclusions of Law and the Judgment of the Court.

The plaintiff moves the court to amend, modify, and correct the conclusions of law entered in supposed accordance with the opinion

of the supreme court, and also to amend, modify, and correct the judgment- herein and each of them separately and severally in the following respects—that is to say:

I. To amend, modify, and correct the first conclusion of law—

a. By inserting the words "that the plaintiff is entitled to sixteen per cent. penalty upon the amount stated by reason of the failure of said defendant to pay the taxes assessed for the year 1893 or the first installment thereof on or before the third Monday in April, 1894, and by reason of its continued refusal to pay said taxes on or before the first Monday in Nov., 1894," in lieu of the words "but without penalty except as to the fifty per cent. penalty hereinafter set forth."

b. By adding the words "that the amount of such recovery and the penalties thereon aggregate the sum of $10,275.79."

II. To amend, modify, and correct the second conclusion of law—

a. By inserting after the amount of $8,951.02 the following: "Together with ten per cent. penalty thereon by reason of its failure to pay said taxes or the first installment thereof on or before the third Monday in April, 1895."

193 *b.* By inserting in lieu of the words "but without penalty except as to the fifty per cent. penalty hereinafter set forth" the words "said sum with said penalty amounting in the aggregate to the sum of $9,846.12."

III. That the third conclusion of law should be amended, modified, and corrected by inserting the words

a. "being the sum of $30,182.87, including all penalties," in lieu of the words "the whole amount of the recovery of plaintiff from said defendant, The Adams Express Company, being the sum of $26,714.19."

IV. That the fourth conclusion of law be amended, modified, and corrected by inserting the words

"$30,182.87" in lieu of the words "$26,714.19."

V. That the fifth conclusion of law be amended and modified by striking out the words

"but without penalty except as to the fifty per cent. penalty hereinafter set forth" and inserting in lieu thereof the words "with sixteen per cent. penalty thereon by reason of its failure to pay the taxes assessed or the first installment thereof on or before the third Monday in April, 1894, and by reason of its continued refusal to pay said taxes on before the first Monday of Nov., 1894, the amount of such recovery and said penalties aggregating the sum of $8,749.45."

VI. To amend and modify the sixth conclusion of law by inserting in lieu of the words

"but without penalty except as to the fifty per cent. penalty hereinafter set forth" the words "together with ten per cent. penalty thereon by reason of its failure to pay said taxes and

194 the first installment thereof on or before the third Monday

in April, 1894, said sum, with the penalties, amounting in the aggregate to the sum of $8,330.32."

VII. To amend and modify the seventh conclusion of law by striking out the words and figures

"$22,672.53" and inserting in lieu thereof "$25,619.66, including all penalties."

VIII. To amend and modify the eighth conclusion of law by inserting in lieu of the words and figures "$22,672.53" the words and figures "25,619.66."

IX. To amend and modify the ninth conclusion of law by striking out the words

"but without penalty except as to the fifty per cent. penalty hereinafter set forth" and inserting in lieu thereof the words "with sixteen per cent. penalty thereon by reason of *its* failure of said defendant to pay the taxes assessed or the first installment thereof on or before the third Monday in April, 1894, and by reason of its continued refusal to pay said taxes on or before the first Monday in Nov., 1894, the amount of such recovery and said penalties aggregating the sum of $3,491.80."

X. To amend and modify the tenth conclusion of law by striking out the words

"but without penalty except as to the fifty per cent. penalty hereinafter set forth" and inserting in lieu thereof the words "together with ten per cent. penalty thereon by reason of its failure to pay said taxes and the first installment thereof on or before the
195 third Monday in April, 1894, said sum, with said penalty, amounting in the aggregate to the sum of $3,914.88."

XI. To amend and modify the eleventh conclusion of law by striking out the words

"to the sums above named a penalty of fifty per cent. upon the aggregate amounts due, as above stated, for and on account of the taxes for the years 1893 and 1894, the whole amount of the recovery of plaintiff from said defendant, The United States Express Company, being the sum of $9,853.73," and inserting the words "in addition thereto a penalty of fifty per centum upon the aggregate amounts due as above stated, the whole amount of the recovery of plaintiff from said defendant, The United States Express Company, being the sum of $11,110.02, including all penalties."

XII. To amend and modify the twelfth conclusion of law by striking out the words and figures

"$9,853.73" and inserting in lieu thereof the words and figures "$11,110.02."

XIII. To amend and modify the several judgments by striking out the words and figures

"$26,714.19" in the judgment against the Adams Express Company and inserting in lieu thereof the sum of "$30,182.87."

XIV. By striking out the words and figures

a. "$22,672.53 in the judgment against the American Express Company" and inserting in lieu thereof the words and figures "$25,619.66."

XV. By striking out the words and figures

a. "$9,853.73" in the judgment against the United States
196 Express Company and inserting in lieu thereof the words and figures $11,110.02,"

for the reasons that said several conclusions of law and the judgment thereon are not in accordance with the law and contrary to the mandate of the supreme court.

WILLIAM A. KETCHAM,
Att'y Gen'l.

ALONZO GREEN SMITH,
LEON O. BAILEY AND
MERRILL MOORES,
Of Counsel.

197 And the court, being sufficiently advised in the premises, does now overrule said motion to each and every specification thereof; to which ruling the plaintiff at the time excepts; and now, on this 29th day of January, 1896, and within the time allowed by the court, the plaintiff files its bill of exceptions as to the rulings of the court upon the motions so heretofore filed by said plaintiff; which said bill of exceptions is now examined by the court and ascertained to be correct and ordered to be filed and made a part of the record herein, which is now done accordingly, said bill of exceptions being in the words and figures following, to wit:

198 THE STATE OF INDIANA
vs.
THE ADAMS EXPRESS COMPANY *et al.*, Consolidated. } No. 7289.

Be it remembered that heretofore, to wit, on the 29th day of January, 1896, the same being the twenty-first day of the January term of the circuit court of Marion county, the following proceedings were had in the above-entitled cause before the Hon. Edgar A. Brown, presiding, to wit:

The plaintiff filed its certain motion in writing to require the court to restate its conclusions of law, said motion being in the words and figures following, to wit:

(Here insert.)

And the court, upon consideration of said motion, sustains the same in so far as it asks the rendition of judgments for the amounts due the State, and that said judgments should be entered as of the 4th day of Sept., 1895, but overrules said motion in so far as it asks that conclusions of law should be stated allowing a penalty of sixteen per cent. upon the taxes due for the year 1893 and allowing a

penalty of ten per cent. upon the taxes due for the year 1894 by reason of the failure of said defendants and each of them respectively to pay the taxes or the first installments thereof for the year 1893 on or before the third Monday in April, 1894, and by reason of the continued refusal to pay said taxes on or before the first Monday in Nov., 1894, and by reason of the failure of the defendants and each of them respectively to pay the taxes assessed against them, or the first installment thereof, for the year 1894 on or before the third Monday in April, 1895; to which ruling of the court in so failing and refusing to state its conclusions of law and each of them the plaintiff at the time excepts, and thirty days' time is allowed within which to file its said bill of exceptions.

199 And be it further remembered that thereafter, to wit, on the day and year aforesaid and after the court had stated its conclusions of law and entered its judgment thereon, the plaintiff filed its certain other motion asking the court to amend, modify, and correct its said several conclusions of law in the respects specifically pointed out in said motion, and also to amend, modify, and correct the judgments in the respects specifically set forth in said motion, said motion being in the words and figures following, to wit:

(Here insert.)

Which said motion in each, every, and all respects the court overruled and wholly failed and refused to amend, modify, and correct said conclusions of law or said judgments in any respect whatever; to which said rulings of the court and each of them, separately and severally, the said plaintiff at the time excepts, and now, on this 29th day of January, 1896, and within the time allowed by the court, the plaintiff tenders this its bill of exceptions upon the action of the court on the motion so hereinabove set forth and the several specifications thereof and the several rulings of the court in relation thereto, and prays that it may be examined and when found correct that it may be signed, sealed, and made a part of the record; and the court, having now examined said bill of exceptions and having found that it correctly states the exceptions so taken by the plaintiff at the time, does now sign and seal the same and order it to be made a part of the record herein this 29th day of Jan., 1896.

EDGAR A. BROWN, *Judge.*

200 STATE OF INDIANA, }
County of Marion, } *ss:*

I, James W. Fesler, clerk of the circuit court within and for the county aforesaid, do hereby certify that the foregoing are full, true, and complete copies of all the entries of proceedings had and also of all the papers filed in said Marion circuit court in said causes numbered 7284, 7288, and 7289 as appear from the records and files thereof now in my custody and keeping.

Seal Circuit Court, Marion County, Indiana.

In testimony whereof I hereunto subscribe my name and affix the seal of said Marion circuit court, at my office, in the city of Indianapolis, Indiana, the 3rd day of February, 1896.

JAMES W. FESLER, *Clerk.*

201 STATE OF INDIANA, *Marion County,* } *ss:*

I, Edgar A. Brown, sole judge of the Marion circuit court of Marion county and judge of the nineteenth judicial circuit of the State of Indiana, do hereby certify that Marion county, in the State of Indiana, constitutes the said nineteenth judicial circuit of said State, and that the foregoing attestation and certificate of James W. Fesler is in due form of law, and that the said James W. Fesler is and at the time of the making of said certificate and attestation was the clerk of said Marion circuit court of Marion county, in the said State, and is and at the same time was the proper officer to make such attestation and certificate, and that his signature thereto is genuine, and that as such clerk he is the sole custodian of the papers, documents, records, and seal pertaining to said court.

Seal Circuit Court, Marion County, Indiana.

Witness my hand and the seal of said court, affixed at the city of Indianapolis, Indiana, this third day of February, 1896.

EDGAR A. BROWN,
Judge of the Marion Circuit Court of Marion County, Indiana, Being the 19th Judicial Circuit of said State.

STATE OF INDIANA, *Marion County,* } *ss:*

I, James W. Fesler, clerk of the Marion circuit court of Marion county, in the State of Indiana, said county constituting the nineteenth judicial circuit of said State, do certify that Hon. Edgar A. Brown, whose signature appears to the foregoing certificate, is and was at the time of signing said certificate the sole judge of said court, duly commissioned and qualified in accordance with the laws of the State of Indiana.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Indianapolis, Indiana, this 3rd day of Febr'y, 1896.

Seal Circuit Court, Marion County, Indiana.

JAMES W. FESLER,
Cl'k Clerk *of the Marion Circuit Court of Marion County, Indiana.*

202 Be it further remembered that afterwards, to wit, on the 13th day of March, 1896, the said The Adams Express Company, The American Express Company, and The United States Express Company, respectively, as plaintiffs in error, filed in the said Marion circuit court writs of error issued by the Supreme Court

of the United States, the entry of said filing being in these words and figures, viz:

Come now the defendants in causes numbered 7284, 7288, and 7289 of this court, and each defendant now files a writ of error issued by the Supreme Court of the United States, in these words and figures, viz:

203 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judge of the Marion circuit court of Marion county, Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Marion circuit court, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Indiana, plaintiff, and The American Express Company, defendant, No. 7284, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
204 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 7284. Filed Mar. 13, 1896. James W. Fesler, clerk.

205 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judge of the Marion circuit court of Marion county, Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Marion circuit court, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Indiana, plaintiff, and The Adams Express Company, defendant, No. 7288, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
206 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 7288. Filed Mar. 13, 1896. James W. Fesler, clerk.

207 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judge of the Marion circuit court of Marion county, Indiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Marion circuit court, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Indiana, plaintiff, and The United States Express Company, defendant, No. 7289, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a
208 treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 7289. Filed Mar. 13, 1896. James W. Fesler, clerk.

209 And be it further remembered that on the said 13th day of March, 1896, said The Adams Express Company, The American Express Company, and The United States Express Company,

by counsel, respectively filed in the said Marion circuit court supersedeas bonds respectively, the entry of said filing being in these words and figures, viz:

And now comes each of the aforesaid defendants and files a supersedeas bond in these words and figures—that is to say:

210 Know all men by these presents that we, The American Express Company, as principal, and —— ——, as sureties, are held and firmly bound unto the State of Indiana in the full and just sum of twenty-five thousand dollars, to be paid to the said State of Indiana or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the Marion circuit court, in a suit depending in said court between The State of Indiana, as plaintiff, and said American Express Company, The Adams Express Company, and The United States Express Company, defendants, a judgment was rendered against the said American Express Company for the sum of twenty-five thousand dollars ($25,000.00), and the said company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Indiana, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said American Express Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE AMERICAN EXPRESS CO.,
By R. D. HUGHES, *Gen'l Sup't.* [SEAL.]
JOHN J. SMITH. [SEAL.]
GEO. M. EWING. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

211 Know all men by these presents that we, The Adams Express Company, as principal, and John F. Wallick, as surety, are held and firmly bound unto the State of Indiana in the full and just sum of thirty thousand dollars, to be paid to the said State of Indiana or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the Marion circuit court, in a suit depending in said court between The State of Indiana, as plaintiff, and said Adams Express Company, The American Express Company, and The United States Express Company, defendants, a judgment was rendered against the said Adams Express Company for the sum of twenty-six thousand seven hundred and fourteen dollars and nineteen cents, and the said company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Indiana, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Adams Express Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ADAMS EXPRESS CO., [SEAL.]
By JNO. J. HENDERSON, *Ag't.* [SEAL.]
JNO. F. WALLICK. [SEAL.]

Sealed and delivered in presence of—
JACOB H. WINTER.
SAM. B. PURMAN.

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

212 Know all men by these presents that we, The United States Express Company, as principal, and The Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the State of Indiana in the full and just sum of twelve thousand dollars ($12,000.00), to be paid to the said State of Indiana or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the Marion circuit court, in a suit depending in said court between The State of Indiana, as plaintiff, and said United States Express Company, The Adams Express Company, and The American Express Company, a judgment was rendered against the said United States Express Company for the sum of nine thousand eight hundred and fifty-three dollars and seventy-three cents, and the said company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Indiana, citing and admonishing it to

be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said United States Express Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED STATES EXPRESS CO.,
By C. S. PHILLIPS, *Ag't.* [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JOHN B. ELAM, *Its Attorney-in-fact.* [SEAL.]

Attest: GEORGE W. PANGBORN, [SEAL.]
General Agent.

Sealed and delivered in presence of—
—— ——.

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

213 UNITED STATES OF AMERICA, *ss:*

To The State of Indiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Marion circuit court of Marion county, Indiana, wherein The Adams Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

214 Service of the within citation is hereby accepted without prejudice this 13th day of March, 1896.

WILLIAM A. KETCHAM,
Attorney General of Indiana.

215 UNITED STATES OF AMERICA, *ss:*

To The State of Indiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office

of the Marion circuit court of Marion county, Indiana, wherein The American Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

216 Service of the within citation is hereby accepted without prejudice this 13th day of March, 1896.

WILLIAM A. KETCHAM,
Attorney General of Indiana.

217 UNITED STATES OF AMERICA, *ss:*

To The State of Indiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Marion circuit court of Marion county, Indiana, wherein The United States Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

218 Service of the within citation is hereby accepted without prejudice this 13th day of March, 1896.

WILLIAM A. KETCHUM,
Attorney General of Indiana.

219 STATE OF INDIANA, } *ss:*
County of Marion, }

I, James W. Fesler, clerk of the circuit court within and for the county aforesaid, do hereby certify that the foregoing are full, true, and complete copies of the entries of proceedings had in said court in the said causes numbered 7284, 7288, and 7289, and also of the supersedeas bond filed in said Marion circuit court; and I further certify that the writs of error issued by the Supreme Court of the United States and inserted in said transcript are the original writs of error so issued as aforesaid.

All of which appear from the records and files of said Marion circuit court now in my custody and keeping.

Seal Circuit Court, Marion County, Indiana.

In testimony whereof I hereunto subscribe my name and affix the seal of said Marion circuit court, at Indianapolis, Indiana, March 13, 1896.

JAMES W. FESLER, *Clerk.*

220 Supreme Court of the United States.

THE ADAMS EXPRESS COMPANY, Plaintiff in Error,
vs.
THE STATE OF INDIANA, Defendant in Error.

THE AMERICAN EXPRESS COMPANY, Plaintiff in Error,
vs.
SAME, Defendant in Error.

THE UNITED STATES EXPRESS COMPANY, Plaintiff in Error,
vs.
SAME, Defendant in Error.

Notice for the Purpose of Abridging the Printed Record under Rule 10, *Clause* 9.

The plaintiffs in error assign for error that the tax assessments for which judgments were recovered below and the statute of Indiana passed March 6, 1893, under which the same were levied, are in contravention of the following provisions of the Constitution of the United States, to wit, that part of article 1, section 8, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States; article 4, section 2, which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and article 14, section 2, which provides that no State shall make
221 or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law nor deny the persons within its jurisdiction the equal protection of the laws, for the reason that said assessments are not made against the plaintiffs in error in respect of any property belonging to them in the State of Indiana or subject to the taxing power of said State or upon the basis of the value of any such property as property, but are really an attempt to enforce against the plaintiffs in error the payment of a tax for the privilege of carrying on their business in the State of Indiana, which is largely interstate commerce.

The plaintiffs in error consider the following portions of the record unnecessary for the consideration of the case, and they therefore propose to omit the same in printing the record, to wit:

1. The articles of association of the three express companies, as set forth in the first special finding of facts. Transcript, pp. 31 to 61, inclusive. Plaintiffs in error propose, after the words "being

as follows," on page 31 of the transcript, to print (here follow copies of the articles of association of each of the defendants) in lieu of printing the articles themselves.

2. The details of the mileage fixed by the State board against the various plaintiffs in error, as set forth in the fifth special finding of facts, on pages 65 to 75 of the transcript. Plaintiffs in error propose, in lieu of said detailed statement, to print said pages of the transcript substantially as follows:

222 For the year 1893, to the American Express Company:

In the county of Bartholomew .....14 miles.
In the county of Benton.....42 miles.

(Here follow the various other counties and the mileage of the American Express Company in each, during the year 1893.)

And in like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The American Express Company, in the several counties in this State, as follows:

In the county of Bartholomew .....14 miles.
In the county of Benton.....42 miles.

(Here follow the other counties and mileage.)

And said board did in like manner ascertain, assess and fix the mileage of the defendant, The Adams Express Company, in said several counties in the State, for the year 1893, as follows:

In the county of Adams.....23 miles.
In the county of Allen .....61 miles.

(Here follow the other counties and mileage.)

In like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The Adams Express Company, in the several counties in the State, for the year 1894, as follows:

In the county of Adams .....26 miles.
In the county of Allen .....61 miles.

(Here follow the other counties and mileage.)

And said board did in like manner ascertain, assess and fix the mileage of the defendant, The United States Express Company, in said several counties within the State, for the year 1893, as follows:

In the county of Allen .....27 miles.
In the county of Benton.....21 miles.

(Here follow the other counties and mileage.)

And in like manner, in the year 1894, said board did ascertain, assess and fix the mileage of the defendant, The United States Express Company, within the several counties in the State, for the year 1894, as follows:

In the county of Allen.....25.33 miles.
In the county of Benton.....23.34 miles.

(Here follow the other counties and mileage.)

223 3. The details of the rate of taxation in the several counties for the years 1893 and 1894 set forth in special finding of facts No. 6, Transcript, pp. 75 to 77. The plaintiffs in error propose to print said sixth finding as follows:

Sixth. The rate of taxation in the several counties for the years 1893 and 1894, upon the one hundred dollars, was as follows:

	1893.	1894.
In the county of Adams	$1 47	$2 34
In the county of Allen	1 40	2 02

(And so on for all the counties.)

4. The detailed figures contained in the eighth special finding of facts, Transcript, pp. 78 to 105. The plaintiffs in error propose to print said eighth finding as follows:

Eighth. Upon the assessment so made by said State board of tax commissioners, and so certified to the auditor of State, and by him so certified to the several county auditors, there *was* assessed against the said several defendants, in addition to the assessments made of their property subject to local taxation by the local authorities, the following sums and amounts in the various counties within ~~the State~~ against the defendants as follows:

For the year 1893:

In the county of Adams against the defendant, The Adams Express Company, the sum of	$84 52
In the county of Allen against the Adams Express Company, the sum of	213 50
In the county of Allen against the United States Express Company, the sum of	66 15

(And so on, the assessments in each of the counties against each of the defendant companies for 1893.)

For the year 1894:

In the county of Adams against the defendant, The Adams Express Company, the sum of	$152 10
In the county of Allen against the Adams Express Company, the sum of	308 05
In the county of Allen against the United States Express Company the sum of	89 54

(And so on, the assessments in each of the several counties against each of the defendant companies for 1894.)

LAWRENCE MAXWELL, JR.,
Of Counsel.

To Hon. Wm. A. Ketcham, attorney general.

224 Service of within notice accepted this 13th day of March, 1896.

WILLIAM A. KETCHAM,
Att'y Gen'l of Indiana.

Endorsed on cover: Case No. 16,229. Indiana, Marion circuit court, Marion county. Term No., 469. The American Express Company, plaintiff in error, *vs.* The State of Indiana. Case No. 16,230. Term No., 470. The Adams Express Company, plaintiff in error, *vs.* The State of Indiana. Case No. 16,231. Term No., 471. The United States Express Company, plaintiff in error, *vs.* The State of Indiana. Filed March 19th, 1896.

165-258

Office Supreme Court, U. S.
FILED.
OCT 13 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE AMERICAN EXPRESS CO.,
Plaintiff in Error,
v.
THE STATE OF INDIANA,
Defendant in Error.
No. 16229.
Case No. 469

THE ADAMS EXPRESS CO.,
Plaintiff in Error,
v.
THE STATE OF INDIANA,
Defendant in Error.
No. 16230.
Case No. 470

THE UNITED STATES EX. CO.,
Plaintiff in Error,
v.
THE STATE OF INDIANA,
Defendant in Error.
No. 16231.
Case No. 471

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

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OCTOBER TERM, 1896.

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THE STATE OF INDIANA,
Defendant in Error.
No. 16231.
Case No. 471

William A. Ketcham, who is the Attorney-General for the State of Indiana, the defendant in error, and as such charged with the duty of representing said State in the above entitled cases, would respectfully represent and show to the Court that said cases have been advanced and set for argument on the 19th day of October, 1896, following the cases set for argument on that day. That there is now pending in the State of Indiana a political campaign preliminary and preparatory to an election to take place on the 3d day of November next, at which election there will be in said State a general election, to wit: an election for presidential officers, and for a full State and county ticket, including the Governor and other State officers, among others an Attorney-General. That your petitioner is at the present time not only the Attorney-General of the State, but is a candidate at such election for re-election, and in accordance with the settled practice that has obtained from time immemorial in said State, said candidates are expected and required to participate in discussing the issues between the political parties before the people, and such participation is expected and required not only by the political committees, but also by the people, and without neglecting the duty that he owes to the party to which he belongs, and to the people with respect to the participation in such discussion, your petitioner as such Attorney-General can not participate in the argument of the causes set forth above. That he is unwilling to neglect his duties to

the State with respect to such arguments, and also unwilling to neglect his duties in such political campaign, unless it is found that that course is necessary in order to perform his duties to the Court and this State of which he is an officer.

He further shows the Court that on the 2d day of October, 1896, the appeal in the case of *The Western Union Telegraph Company* v. *The State of Indiana*, from the Circuit Court of Marion County, Indiana, was decided by the Supreme Court of Indiana, in favor of the appellee, the State of Indiana; that the decision by said Court was upon some and the more important questions involved in the appeals herein, and as your petitioner is informed and believes it is the intention of said appellant, The Western Union Telegraph Company, to apply for a writ of error to this Court from such decision, and upon such application no question whatever will be presented upon the writ of error so applied for other than as is presented in the above entitled cases, and that it will be of importance not only to said Western Union Telegraph Company, but also to the State of Indiana, that the questions of law arising and presented by the record in said last named case should be heard, considered and determined in connection with the hearing of the above entitled cases, as otherwise this honorable Court will have its time occupied with substantially the same questions, and there will be delay prejudicial to the interests of the State of Indiana and the necessity for a different hearing and argument before this honorable Court.

Your petitioner further shows that the record in said last named case can, as he believes, be prepared, transmitted to the Court and printed in readiness for argument not later than the first of December, and he therefore respectfully asks that the argument of the above entitled causes be postponed until such time as the convenience of the Court will permit following the end of November.

Respectfully submitted,

WILLIAM A. KETCHAM,
Attorney-General.

ALONZO GREENE SMITH,
MERRILL MOORES,
LEON O. BAILEY,
Of Counsel.

165-253
165-255

Office Supreme Court, U. S.
FILED
NOV 30 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 469.

THE AMERICAN EXPRESS COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF INDIANA.

No. 470.

THE ADAMS EXPRESS COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF INDIANA.

No. 471.

THE UNITED STATES EXPRESS COMPANY, *Plaintiff in Error,*

vs.

THE STATE OF INDIANA.

IN ERROR TO THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA.

BRIEF FOR THE EXPRESS COMPANIES.

Printed by JAMES BARCLAY, 108-118 Canal St., Strobridge Building, Cincinnati, O.

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Respectfully submitted,

WILLIAM A. KETCHAM,
Attorney-General.

ALONZO GREENE SMITH,
MERRILL MOORES,
LEON O. BAILEY,
Of Counsel.

165-252

165-255

Office Supreme Court, U. S.
FILED
NOV 30 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1896.

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THE UNITED STATES EXPRESS COMPANY, *Plaintiff in Error*,

vs.

THE STATE OF INDIANA.

IN ERROR TO THE MARION CIRCUIT COURT OF MARION COUNTY, INDIANA.

BRIEF FOR THE EXPRESS COMPANIES.

STATEMENT OF THE CASE.

These are three suits brought by the State of Indiana, in the circuit court of Marion County, Indiana, against the American Express Company, the Adams Express Company, and the United States Express Company respectively, to recover taxes assessed against them for the years 1893 and 1894, by the State Board of Tax Commissioners, under the act of March 6, 1893; Acts 1893, p. 374; Burns' Ann. Rev. of 1894, sec. 8480.

The defendants answered denying the validity of the assessments. The plaintiff replied. The cases, being substantially the same, were consolidated by consent of counsel and heard together as one case [Rec. 46]. The issues were tried by the court without a jury, and the facts were found specially at the request of the plaintiff [Rec. 47]. The Marion circuit court held as conclusion of law from the facts so found that the State was not entitled to recover [Rec. 52], and entered judgment accordingly, dismissing the suits [Rec. 53]. The State appealed to the Supreme Court of Indiana, where it was held that the State was entitled to recover, and the cases were remanded to the Marion circuit court with directions to restate its conclusion of law upon the facts found, and to enter judgment for the amount of the taxes [Rec. 60]. These are writs of error from the judgment so rendered by the Marion circuit court, in pursuance of the mandate of the Supreme Court of Indiana.

ASSIGNMENT OF ERROR.

We submit that the taxes sued for, and the statute of Indiana under which they were levied, are in contravention of the interstate commerce clause of the federal constitution, and also of the fourteenth amendment, and that the court below erred in rendering judgment, upon the facts found, in favor of the plaintiff.

ARGUMENT.

The grounds upon which the defendants deny the validity of the assessments are set forth in detail in the first paragraph of their answers. Briefly stated, the defense is that the assessments are not levied in respect of property belonging to the defendants in the state of Indiana, or subject to the taxing power of the state, but that they are really an attempt, under the guise of taxing property, to enforce

a tax for the privilege of carrying on business which is principally interstate commerce.

The court below finds, and it is therefore an admitted fact in the case, that the defendants were assessed in 1893 and 1894 for state, county, municipal and other purposes upon all of their property in the state subject to local taxation, and that they have paid all such assessments. [Findings of Fact 9 and 11, Rec. 51, 52.] The further tax now sued for is a tax of $250 per mile on each mile of the "routes" of the American and Adams Express Companies, within the state of Indiana, and $175 per mile on each mile of the "route" of the United States Express Company within the state.

The act under which the defendants are already taxed, as above stated, upon their personal property within the state, is the act of March 6, 1891; Acts 1891, p. 199; Burns. Ann. Rev. 1894, sec. 8480 *et seq.* For the convenience of the court we file a pamphlet containing a copy of this statute and also of the act of March 6, 1893, under which the further taxes involved in this suit are levied. Sections 50 to 53 of the act of 1991, provide for the assessment against express companies, in common with all other persons and companies, of every species of personal property found within the state, including horses, wagons, safes, appliances, moneys and credits. All such taxes have been paid by the defendants, and we submit that there is nothing further upon which they can be taxed by the state.

The court below expressly finds that the defendants had no property in the state of Indiana during the years 1893 and 1894, aside from the property so assessed by the local officers under the act of 1891 (on which all taxes have been paid), except that the American Express Company had six safes which were used on its through route between Cin-

cinnati and Chicago, and six which were used on its through route between St. Louis and Cleveland, which, together with the chair and lamp of the messenger used upon said routes, were not returned to the local authorities for taxation in the state of Indiana, because they were assigned by the company to the office of the residence of the messenger, and returned for taxation from that office. [Finding No. 10, Rec. 51, 52.] In other words, it is established by the record that the defendant companies had no property in the state of Indiana subject to taxation, except that which had been duly assessed under the act of March 6, 1891, for state, county and municipal purposes in the various counties, townships and municipalities in which it was located. It follows, we submit, as a necessary conclusion of law, that the additional assessments made by the state board are illegal.

The Supreme Court of Indiana concede that the tax can not be sustained unless it is shown to be a tax levied upon actual property within the state of Indiana, and further that the state can not call something property which is not property and tax a person or corporation or partnership thereon as property. "To do so," they say, "in relation to these appellees, who are engaged in interstate commerce, would violate the federal constitution" [Opinion, Rec. 56]. This concession of the Supreme Court of Indiana, reduces the question for discussion to the single proposition whether the taxes sued for are really levied in respect of property belonging to the defendants within the state of Indiana.

It is not suggested by the Supreme Court of Indiana that the defendants have any property within the state except that upon which they have already been assessed under the act of 1891, for state, county, municipal and other purposes, in the various localities in which it is situated.

Indeed no such claim could well be made, for it is expressly found, and must therefore be accepted as a fact in the case, that the defendants had no other property in the state. [Finding of fact No. 10, Rec. 51, 52]. The Supreme Court of Indiana freely concede this point. They admit that the very property assessed against the defendants under the act of 1891 is the basis and the only basis of the further tax levied by the State Board. They say:

"It is very clear, we think, if the board followed this statute (and it is practically conceded by the appellee that the finding shows that to be the case), that their entire assessment was every particle of it on actual property, and not on a myth or wind or air or sunshine, and it was property within the State of Indiana. *The assessment was on all the property in the several counties in the State subject to local taxation*, which for the purpose of arriving at its true and actual value, must, as the legislature has wisely provided, be united with all the property owned and used by the company in the prosecution of its business in whatever state situate." [Opinion of Supreme Court of Indiana, Rec. 57].

How this "true and actual value" of the horses, wagons, safes, trucks and office appliances, which constitute the only property of the express companies within the state, is arrived at is shown by Section 7 of the Act of 1893. The State Board is first to "ascertain the true cash valuation of the entire property owned by the association, . . . for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value." In case the whole or any portion of the property of the company be incumbered by mortgage the board "shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, the aggregate amount of such mortgage, and the result shall be deemed and treated as the true cash value of the property of such association." The board is then directed to deduct

the assessed value for taxation of the several pieces of real estate without the state of Indiana, and not specifically used in the general business of the association. "Said State Board shall next ascertain and assess the true cash value of the property of such association within the state of Indiana, by taking the proportion of the whole aggregate value of said association *as above ascertained*, after deducting the assessed value of such real estate without the state . . . which the length of the lines or routes within the state of Indiana bears to the whole length of the lines or routes of such association, *and such amount so ascertained shall be deemed and held as the entire value of the property of said association within the state of Indiana.*"

In other words, instead of assessing the horses and wagons and other appliances of an express company according to their true value in money, as the same and similar property is assessed against all other owners, an express company is assessed, under this statute, on the market value of its capital stock, in the proportion which the length of its routes in Indiana bears to the total length of all of its routes.

But that is not assessing the company's *property within the state.* It is assessing its capital stock. Calling the tax something else does not relieve it from the infirmity to which it would be subject if it were called a tax on capital stock, because that is what it is in fact.

The decision of the Supreme Court of Indiana rests upon the assumption that the horses, wagons, safes, trucks and other appliances of an express company constitute a unit, like a railroad or telegraph. The court insist that you do not ascertain the true value of such property in the hands of an express company by estimating the items separately. To do so, they say, "breaks the property into fragments," and they distinctly avow that the statute "authorizing the

system of valuation known as the unit system of valuation" was passed "to avoid the great destruction of values" involved in assessing the property of express companies on the basis of its ordinary value as property. [Opinion, Rec. 58.]

But to say that this sort of detached and fugitive property, because it is employed in the business of an organized express company, is unit property, like a railroad or telegraph, is only another way of attempting to justify a tax upon the capital stock or business of the company, under the pretense of assessing its property. A railroad or telegraph may be treated as a unit in law, for the purpose of taxation, because it is a unit in fact; an actual, tangible, physical unit. But that is not true of the property of an express company.

The idea that the property of railroad express companies may be treated as unit property, and assessed otherwise than according to its ordinary value, is inconsistent with the observations of this court in Pacific Express Co. *vs.* Seibert, 142 U. S. 339, 354, where Mr. Justice Lamar, in justifying an excise tax on the receipts of railroad express companies says:

"Express companies, such as are defined by this act, have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted."

It is also said in defense of this tax that property must be assessed for taxation at the value which it has, as used, and by reason of its use. It is true that the value of real estate, or of property, such as a railroad or telegraph, attached to real estate, depends largely upon the use to which it is put, or rather upon the use to which it is capable of being

put in that location, because, being attached and immovable, it can not be used elsewhere, and that particular use therefore affects and may determine its market value, which, after all, is the ultimate test of the value of everything. But the market value of fugitive personal property, such as horses and wagons, *considered as property*, is not dependent upon the use to which it may be put by a particular owner. The value of a horse or wagon, considered as property, is the same, whether the owner uses it in the grocery business or in the express business, in a business that makes money or in a business that loses money. The defendants have no property in the state of Indiana except certain horses, wagons, safes and other appliances, property of the ordinary kind, whose value in money is easily ascertained by ordinary standards, for a horse is a horse, and a wagon is a wagon, whether it belongs to a farmer, a merchant, a drayman, or an express company. The express companies must pay taxes upon their horses and wagons according to their market value, whether they lose or make money in their business, and whether they make much or little. We may suppose two express companies, with the same personal property and tangible appliances, one of which makes money, and the other of which makes less money, or none, in carrying on their business. But the property of the two companies, considered as property, must be assessed the same. In valuing property, as property, no discrimination is permitted on account of the success of the business in which it is used. The opposite view comes to this: that the horses and wagons of an express company may be assessed at ten or twenty fold their value, according as they happen to be used in connection with a business that yields profits. But that is not assessing the property, as property. It is assessing the profits of the business.

Section 68, of the act of March 6, 1891, provided for a tax on the gross receipts of express companies from their business, state *and interstate*, in addition to the tax imposed upon their tangible property, moneys and credits. This tax on their gross receipts was clearly illegal. (*Fargo* vs. *Michigan*, 121 U. S. 230; *Philadelphia and Southern Steamship Co.* vs. *Pennsylvania*, 122 U. S. 326; *Ratterman* vs. *Western Union Telegraph Co.*, 127 U. S. 411. The purpose of the act of 1893, so far as express companies are concerned, was to substitute for this illegal tax on gross receipts (which the act of 1893 repealed) an equally illegal tax on the "routes" of express companies, in addition to the tax on their property.

But no argument can make the case plainer or clearer than it appears upon its bare statement. The state of Indiana recognizes, what we all know, that the property of express companies is capable of valuation for taxation according to ordinary standards, the same as similar property in the hands of other owners, and by the Act of 1891 it provides for such valuation and for an assessment thereon for state, county and municipal purposes. The defendants have paid those taxes. What is the additional tax now sued for? Against the Adams Company it is an annual assessment on $539,500.00, and against the American Company on $458,000.00. But the defendants have no such property in the state. They have none beyond that on which they have already paid their taxes, and the record so finds. Surely this further tax can not be supported as a tax on property within the state. But unless that be its real and true character it falls, for the state of Indiana can not tax the business or occupation of these agencies of interstate commerce, nor their capital stock, nor their receipts, nor their profits, nor anything else except such of

their property as is found within the state, and that property they are entitled to have assessed according to its value, as property, and not upon the basis of the value of something else.

We respectfully submit that the judgment of the Marion Circuit Court should be reversed and that the case should be remanded with directions to enter judgment, upon the facts found, for the defendants.

LAWRENCE MAXWELL, JR.

BAKER & DANIELS,
Counsel.

CLARENCE A. SEWARD,
Counsel for the Adams Express Company.

JAMES C. CARTER,
Counsel for the American Express Company.

FRANK H. PLATT,
Counsel for the United States Express Company.

165-255

DEC 10 1896

Supreme Court of the United States.

OCTOBER TERM, 1896.

Nos. 469, 470, 471.

INDIANA EXPRESS COMPANY TAX CASES.

BRIEF IN REPLY.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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165-255

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INDIANA EXPRESS COMPANY TAX CASES.

BRIEF IN REPLY.

The judgment under review, although entered by the Marion circuit court, is the judgment of the supreme court of Indiana; and it is a *final* judgment. The supreme court of Indiana did not remand the case to the Marion circuit court for further proceedings, but with directions to enter a specific judgment for a certain amount in dollars and cents. Counsel for the plaintiff could not convert that final judgment of the supreme court into something else by asking the circuit court to disobey the mandate of the supreme court; and because the judgment of the supreme court was final, neither party could appeal again to that court from the judgment entered in accordance with its mandate by the Marion circuit court; otherwise, there never could be a final judgment.

There is, indeed, no provision of law to prevent the parties from docketing a second appeal, but such appeal is subject to be dismissed on motion. The general doctrine is well established.

Cook *vs.* Burnley, 11 Wall., 672, 677.
Stewart *vs.* Salamon, 97 U. S., 361.
Humphrey *vs.* Baker, 103 U. S., 736.
Texas & Pacific Railway *vs.* Anderson, 149 U. S., 237, 242.

In Stewart *vs.* Salamon, Chief Justice Waite said:

"An appeal will not be entertained by this Court from a decree entered in the circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves." (97 U. S., 361, 362.)

In Humphrey *vs.* Baker, speaking of a similar case, he said:

"The decree entered below, in the present case, followed the mandate in every particular, and was in legal effect ours. * * * Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the circuit court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions, and may with propriety be considered part of our decree." (103 U. S., 737.)

In *In re* Washington & Georgetown Railroad Co., 140 U. S., 91, 96, Mr. Justice Blatchford said:

"The principle has been well established in numerous cases that on a mandate from this Court, containing a spe-

cific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate."

The practice is the same in Indiana. The following is the statute under which the supreme court of that State remanded the case to the Marion circuit court (Burns' Ann. Rev., 1894):

"SEC. 672. When the judgment is reversed, in whole or in part, the supreme court shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it; but if no new trial is required, with particular instructions relative to the judgment to be rendered and all modifications thereof."

In Center Township *vs.* The Board of Commissioners of Marion County (110 Ind., 579) the court, referring to this statute and to a case like that at bar, where the judgment of the lower court had been reversed and the cause remanded, with directions to restate its conclusion of law and enter a particular judgment, said:

"It became the duty of that court to comply implicitly and without unnecessary delay with such instructions and to render judgment in accordance therewith. That court had no discretion. It had, in fact, no power to render any other or different judgment in this case than the judgment it was required to render by the instructions and mandate of this court." (110 Ind., 586.)

And it was accordingly held that motions made in the lower court, after its receipt of the mandate, in arrest of judgment and for correction of the special findings were properly overruled.

Judge Elliott, formerly a judge of the supreme court of Indiana, states the practice thus in his Appellate Procedure, section 529:

"An appeal from a judgment rendered in obedience to the mandate of the appellate tribunal may be dismissed on motion. This conclusion results from the principles declared and the authorities cited in another chapter."

In the chapter to which he thus refers he points out that the supreme court, when it reverses a case, may grant a new trial if justice demands it, but that it will ordinarily remand the case to the lower court to enter a particular judgment where there is a finding of facts, for the purpose, as the author says, of "forever closing the controversy."

The cases cited by the attorney general of Indiana are all instances of remands for further proceedings, ordinarily on the overruling of a demurrer. Such is Great Western Telegraph Co. *vs.* Burnham, 162 U. S., 339. The circuit court of Milwaukee county, Wisconsin, had overruled a demurrer to the complaint on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. On appeal by the defendant to the supreme court of the State that court reversed the order and remanded the case "to the circuit court for such further proceedings therein as may be according to law." Of course, such judgment of the supreme court of Wisconsin was not a final judgment, and a writ of error therefrom to this Court was properly dismissed for want of jurisdiction, Mr. Justice Gray pointing out that the supreme court of Wisconsin had remanded "the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law."

In McComb *vs.* Knox County Commissioners, 91 U. S., 1, the supreme court of Ohio had reversed an order of the court of common pleas overruling a demurrer to an answer, and remanded the case for further proceedings according to law. Chief Justice Waite said:

"The judgment of the supreme court is one of reversal only. As such it was not a final judgment. The common pleas was not directed to enter a judgment rendered by the supreme court and carry it into execution, but to proceed with the case according to law. The supreme court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled, but ample power was left in the common pleas to permit the parties to make a new case by amendment." (91 U. S., 1, 2.)

II.

The writ of error was properly directed to the Marion circuit court, because the "cause was remanded" to that court to enter the judgment and issue execution, and because the record of the judgment can be found only in that court.

The proper practice is thus stated in 2 Foster's Federal Practice (2d ed.), 1003:

"The writ should be directed to the court in which the final judgment was rendered, by whose process it is to be executed, and where the record remains, although a higher court has considered the case upon appeal or writ of error and sent down a remittitur or rescript accordingly. In the latter case the writ may be addressed to the highest court and seek through its instrumentality to obtain the record from the inferior court having it in keeping; but it is the safer practice to address the writ to the court which has the record."

Polleys *vs.* Black River Co., 113 U. S., 81, was the case of a bill filed in the circuit court of La Crosse county, Wisconsin, which that court had dismissed. On appeal the supreme court of Wisconsin reversed the judgment and delivered an opinion that the plaintiff was entitled to relief, and remanded the case to the circuit court, with directions to enter judgment in accordance with the opinion. Judgment having been entered accordingly in the circuit court, the defendant sued out a writ of error to that court from this Court to review a Federal question. The defendant in error moved to dismiss the writ upon the ground, among others, "that the writ should have been directed to the supreme court of the State, and cannot be rightfully directed to the circuit court of the county" (113 U. S., 82). Mr. Justice Miller, delivering the opinion of this Court, said :

"Though the judgment in the circuit court was the judgment which the supreme court ordered it to enter and was in effect the judgment of the supreme court, it is the only final judgment in the case, and the record of it can be found nowhere else but in the circuit court of La Crosse county. To that court, therefore, according to many decisions of this Court, the writ of error was properly directed to bring the record here for review. Gelston *vs.* Hoyt, 3 Wheat., 246 ; Atherton *vs.* Fowler, 91 U. S., 143, 146." (113 U. S., 82.)

Lee *vs.* Johnson, 116 U. S., 48, was a case commenced in the circuit court of Emmet county, Michigan, where a decree was rendered dismissing the suit. On appeal to the supreme court of the State the decree was reversed and the circuit court directed to enter a decree in favor of the plaintiff for the relief prayed in the bill of complaint. The circuit court having complied with the mandate of the supreme court by entering that decree, the defendant sued out a writ

of error from this Court to the circuit court. Mr. Justice Field said:

"The writ was directed to the judge of the circuit court because the final decree was entered and the record of the suit remained there. Atherton *vs.* Fowler, 91 U. S., 143; Gelston *vs.* Hoyt, 3 Wheat., 246."

This Court reversed the decree of the supreme court of Michigan and remanded the cause to the *circuit court of Emmet county*, with directions to enter a decree in conformity with the opinion of this Court.

In Green *vs.* Van Buskerk, 3 Wall., 448, a judgment was entered by the supreme court of New York in favor of Van Buskerk, which was affirmed in the court of appeals on December 22, 1865, and the record sent to the supreme court of New York with an order directing that court to enter judgment accordingly, in pursuance of which judgment was entered in the supreme court on February 16, 1866. On February 20 a writ of error was duly allowed from this Court to the supreme court of New York. On February 28 the attorneys for the plaintiffs below directed execution to issue. The motion before this Court was for a supersedeas to prevent such execution. The question was whether the judgment below was to be considered as rendered on December 22, the date of the order of the court of appeals, in which event the application for writ of supersedeas would be too late, or on February 16, 1866, the date on which the judgment was entered in the supreme court.

Chief Justice Chase said:

"The true construction of the act of Congress requires us to hold that *a judgment cannot be regarded as final, in the sense of the act, until entered in a court from which execution can issue.*

In the case now before us the record was sent by the court of appeals to the supreme court, and the judgment was entered in the latter court in conformity with the direction of the former. This was, it is true, the judgment of the court of appeals as well as the judgment of the supreme court; but it became a final judgment, on which execution could issue only when entered, on the 16th February, 1866, in the supreme court, to which the record was returned and where it remained. The unsuccessful party had ten days from that entry to take out a writ of error and make it a supersedeas." (3 Wall., 450, 451.)

But we do not understand the objection of the attorney general of Indiana to be that the writ was *directed* to the Marion circuit court instead of to the supreme court of Indiana. His objection is that there is no *final* judgment of the highest court of the State. If that objection is not well taken, as we have endeavored to show, an objection to the mere *direction* of the writ is of no consequence, because a writ can still be issued to the supreme court of Indiana, which would be a useless procedure, since the record is here.

In Gelston *vs.* Hoyt, 3 Wheat., 246, Mr. Justice Story said:

"The judgment to be examined must be that of the highest court of the State having cognizance of the case; but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ of error." (3 Wheat., 304).

In that case the writ was directed to the court of errors of New York, which, having parted with the record, could not execute it. It was then presented to the supreme court,

but, being directed to the court of errors, could not regularly be executed by that court. In that state of things the parties consented to waive all objection to the direction of the writ, and to consider the record as properly brought up, if, in the opinion of this Court, it could be now properly brought up on a writ of error directed to the supreme court of New York; and the court being of opinion that that might be done, the case stood as if the writ of error had been properly directed. (3 Wheat., 304, 305.)

III.

The following are the amounts of the assessments against the plaintiffs in error, made by the State board, in addition to the taxes assessed and paid on the property of the companies within the State:

1893.

Adams,	2,158	miles	at	$250	per mile.	.....	$539,500 00
American,	1,832	"	"	250	"	....	458,000 00
United States,	1,092.37	"	"	175	"	.....	191,164 75

1894.

Adams,	2,158	miles	at	$250	per mile.	.....	$539,500 00
American,	1,826	"	"	250	"	....	456,500 00
United States,	1,248.15	"	"	175	"	.....	218,426 25

LAWRENCE MAXWELL, JR.

ALBERT BAKER,
EDWARD DANIELS,
Of Counsel.

165-255

165-255

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE AMERICAN EXPRESS CO., *Plaintiff in Error,* vs. THE STATE OF INDIANA, *Defendant in Error.*	Case No. 16229. Term No. 469.
THE ADAMS EXPRESS CO., *Plaintiff in Error,* vs. THE STATE OF INDIANA, *Defendant in Error.*	Case No. 16230. Term No. 470.
THE UNITED STATES EXPRESS CO., *Plaintiff in Error,* vs. THE STATE OF INDIANA, *Defendant in Error.*	Case No. 16231. Term No. 471.

ERROR TO THE MARION CIRCUIT COURT.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

A

SYNOPSIS OF BRIEF.

I.

Statement of case, pp. 2 to 8.

a. *Character of action, viz., an action by the State under Sec. 11 of the act of March 6, 1893, concerning taxation of telegraph, etc., companies to collect the taxes delinquent for 1893-4 (p. 2).*

b. *The answers of defendants seeking to allege the unconstitutionality of the act in question.*

1. *Because it provides for an imposition upon interstate commerce (p. 5);*
2. *Because it is a tax upon property not within the State of Indiana (p. 5).*

c. *The trial, specific finding and conclusions of law; omission of evidence in the transcript (pp. 6 and 7).*

d. *Appeal to Supreme Court of State where judgment reversed (p. 6).*

e. *Upon redocketing in nisi prius court motion for judgment in favor of State sustained in part and overruled in part, judgment not including the penalties on delinquent taxes common to all tax-payers (pp. 7 and 8).*

f. *Writ of error prayed and granted to the inferior court (p. 8).*

II.

This Court has no jurisdiction over the writs of error pending (pp. 8 to 20).

a. *The defendant in error is a State and the litigation sought to be reviewed was in the exercise of its sovereign power of enforcing revenues by taxation and not its contractual power, and this Court can exercise no jurisdiction unless there is an express statute conferring such jurisdiction (p. 9).*

b. *The Circuit Court of Marion County, Indiana, to which the writ of error was granted, is an inferior tribunal, and is not "the highest court of the State in which a decision in the suit could be had."*

Burns' Rev. St. of Ind. for 1894, Secs. 644 and 647. Under this law of Indiana the judgments sought to be reviewed on writ of error from this Court were reviewable in the Supreme Court of the State (p. 10).

c. The Supreme Court of the United States has jurisdiction of State courts only where the particular judgment sought to be reviewed was rendered by the highest court of the State in which a decision in the suit could be had (p. 14 et seq.).

Miller v. Joseph et al., 17 Wall. 655.
Fisher v. Perkins, 122 U. S. 522.
Great Western Telegraph Co. v. Burnham, 162 U. S. 339.

III.

Origin of the act of March 6, 1893 (pp. 20 to 22).

a. History of legislation in Indiana touching assessment of express and similar companies.

Acts of 1872, p. 57.
Acts of 1881, p. 611.
Acts of 1891, p. 222.
Acts of 1893, p. 374 (p. 22).

b. Decisions of this Court on requirements of U. S. Constitution,

Ills. R. R. Tax Cases, 92 U. S. 575.
Ky. R. R. Tax Cases, 115 U. S. 321.
Mass. Tel. Tax Cases, 125 U. S. 530.
141 U. S. 40.

Penn. Sleeping Car Tax Cases, Ib. 18.
Kan. Sleeping Car Tax Cases, Ib. 36.

and by the Supreme Court of Indiana as to the requirements of the State Constitution in the Backus cases, 133 Ind. 654, and upon the principles so announced the law of 1893 was enacted (p. 23).

c. The essential element in the law attacked is the unit system announced and approved in the above cases.

IV.

The act is not violative of the United States Constitution.

a. The specific charges of unconstitutionality are:

1. The law authorizes an assessment of property not within the State.

2. That it is a tax upon interstate commerce (p. 28).

b. The construction by the highest court of the State of a statute is a part of the statute.

Western Union Tel. Co. v. Taggart et al., 141 Ind. 281. 162 U. S. 1.

In the former case the Supreme Court of the State construing the act questioned as regards telegraph companies (and it is identical in that respect as regards express companies), held that the Tax Commissioners were forbidden to assess any property except such as was situate within the State, and that only at its true cash value (pp. 32 to 35).

c. The rule of assessment provided by the act of March 6, 1893, is:

1. To ascertain the proportionate value of the property in Indiana and to assign that part to Indiana for taxation, but in no event to assign to Indiana for taxation more or less than the actual value in Indiana, and in so doing to consider the property not as isolated property, but as a part of the whole, i. e., to apply the unit rule in considering the question of value;

2. After giving to each county the benefit of local properties, to apportion the residue of such value on the basis of the mileage in each county (p. 35).

d. The application of the unit rule in determining value of property to be assessed has been approved by this Court in

Ills. R. R. Tax Cases, 92 U. S., at pp. 608 and 611.
Mass. v. W. U. Tel. Co., 125 U. S. 552; 141 Id. 43.
Pullman's Car Co., v. Penn., 141 U. S. 19.
Columbus So. Ry. Co. v. Wright, 151 Id. 481.
Ind. Ry. Tax Cases, 154 Id. 430.
Western Un. Tel. Co. v. Taggart et al., 162 Id. 1.
(pp. 39 to 46.)

STATEMENT OF THE CASES.

These are writs of error not to the Supreme Court of the State of Indiana, but to the Circuit Court of Marion County, Indiana, an inferior tribunal of the State. The plaintiffs in error had failed and refused to pay the taxes assessed against them and entered upon the duplicates under the assessments made by the State Board of Tax Commissioners, claiming that the act of 1893 was in violation of the Constitution of the State and of the United States, and therefore conferred no authority on the State Board of Tax Commissioners to assess their property, and the assessments were therefore void.

The State of Indiana, under and pursuant to the authority conferred by Section 11 of the act of 1893, hereafter more fully set forth, by its Attorney-General instituted three certain actions in the Circuit Court of Marion County against the three plaintiffs in error to recover the unpaid and delinquent taxes due for the year 1893, and afterwards, the cases remaining undisposed of when the taxes for the year 1894 became due and delinquent, by supplemental complaints in each case brought in the taxes for that year against each of the plaintiffs in error.

The defendants respectively filed answers to the complaint and supplemental complaint, each setting forth, in substance, the same state of facts, that of the American Express Company being at

pages 10 to 14, that of the Adams Express Company at pages 25 to 29, and that of the United States Express Company at pages 40 to 44, respectively. These answers aver, in substance, that they are a co-partnership or joint stock association, organized in New York; that they are engaged in the express business, carrying packages on trains, steamboats, and stages, and have no ownership or interest in the means of conveyance in the State, but pay the railroad and steamboat owners for transportation; that it has no property, aside from real estate in Marion County used for barn and stabling purposes, and there assessed, except horses, wagons, harnesses, trucks, safes, and office furniture; that it owns similar property in other States, upon which it pays taxes there, and also stocks and bonds of great value, some of them not taxable, and none held or owned in Indiana or taxable there; that its principal business in Indiana is inter-state commerce, although it does some business in Indiana. All of its personal property has been duly returned for taxation in accordance with the provisions of Section 50 of the act of March 6, 1891, and all of such property has been duly assessed for State, county, municipal and other purposes for 1893 and 1894, and previous years, in the various counties and townships where located, as the property of other persons is assessed, and all of said taxes have been paid.

All the taxes mentioned in the complaint and sued for, and which are admitted not to have been paid, were assessed by the State Board of Tax

Commissioners, under the act of March 6, 1893; that the taxes so assessed and sued for are not assessed on any property of defendant in the State of Indiana, but are in addition to the taxes which have been assessed and paid on all the property owned by it in the State during such years.

That the act in question is in contravention of Sections 12 and 23, of Article I; of Section 1, of Article III; of Section 22, of Article IV, and Section 1, of Article X, of the State Constitution, and because it amends an unconstitutional act; the act of March 6, 1891, and Section 68 being in violation of Section 8, Article I, of the United States Constitution, and it is also in contravention of Section 8, Article I; Section 2, of Article IV, and Section 1, of Article XIV, of the United States Constitution.

That, although protesting that the law was unconstitutional, it filed its statement as required by the act, and the Tax Commissioners, acting in pursuance of the directions of the law, took the proportion of the aggregate market value of all the shares which the length of its lines in Indiana bears to all its lines, and deducting from this amount so ascertained the assessed value for taxation of the real estate and personal property in Indiana, assessed the balance against the defendant, and the taxes sued for are upon such assessments.

That the scheme of taxation provided by the act of 1893, while professing to be a tax upon property, is really an attempt to enforce against

express companies the payment of a tax for the privilege of carrying on their business, and the assessments made are not made in respect of any property belonging to it in Indiana or subject to the taxing power of the State.

But if the act in question can be treated as one for the taxation of defendant's property in Indiana, it is still in contravention of the Constitution of the State, and of the United States, for the reason:

The market price of the shares of express companies is determined not so much by the value of the property or appliances used as by the skill, diligence, fidelity and success with which they conduct business. The defendant owns valuable real estate and bonds, stocks and securities, aggregating millions, none of which are held or taxable in Indiana, but which, together with defendant's business connections, reputation, good will and income from business outside of Indiana, enter largely into the value of its shares. That the value of defendant's property can not approximately be ascertained by applying the mileage basis, because its earnings are not uniform and are much greater in other States than in Indiana.

The market price of the shares does not afford a proper method of estimating the value of the property, because it is speculative and variable and depends upon financial and other conditions not connected with the company, its business or property.

Defendant, before the commencement of the suit, complied with the act of March 29, 1879, requiring the filing of a certificate authorizing the service of process.

The defendants also filed the general issue and pleas of payment.

Upon the issues thus joined, in accordance with the practice that obtains in Indiana, the three cases were consolidated, without objection, and heard at the same time, inasmuch as the same questions of law and fact, except as to the amount of taxes due respectively from the three defendants, were pending in each case.

There was a trial by the Court, a special finding made under the practice that obtains in Indiana, and conclusions of law in favor of the defendants. Upon this, motions for a new trial were filed and overruled, a bill of exceptions filed embodying the evidence, and an appeal prayed and perfected to the Supreme Court of the State, where, upon consideration, the judgment of the Circuit Court of Marion County was reversed with instructions to restate the conclusions of law and enter judgment in conformity with the opinion of the Supreme Court.

Under the practice in Indiana, when a case has been heard at *nisi prius* and an official reporter has been appointed to take down the evidence in shorthand, and the evidence has been written out in longhand, while all the remainder of the record is removed to the Supreme Court upon transcripts of the original papers filed, the original longhand

manuscript of the evidence filed by the official reporter with the clerk is certified in, and as a part of, the transcript and remains thereafter on file in the Supreme Court as a part of its records.

We call attention to this practice because later in this brief it will be necessary to refer to some of the evidence embodied in that record which is not included in this transcript, there being a notation by the Clerk at page 54 of the record in that respect, as follows:

> (Memo.—Said bill of exceptions number 2 is not in my office, having been certified to the Supreme Court of the State of Indiana as part of the transcript in the appeal thereto, pursuant to Section 1410, Revised Statutes of Indiana of 1881.
>
> JAMES W. FESLER,
> *Clerk of Circuit Court of Marion County, Indiana.*)

Upon the cause being docketed upon such reversal and the opinion of the Supreme Court of the State having been spread of record, the defendants in error (printed record, pp. 61 to 63) filed its motion to re-state the conclusions of law and to enter judgment in accordance therewith; whereupon the Court, sustaining the motion in part but denying it in part, re-stated its conclusions of law, as found at pages 63 and 64 of the printed transcript in conclusions from one to twelve inclusive; and thereupon judgment was rendered in favor of the defendant in error against the plaintiff in error, the Adams Express Company, for $26,714.19; against the plaintiff in error, the American Express Company, for $22,673.47; and against the

plaintiff in error, the United States Express Company, for $9,853.73.

The defendant in error thereupon, pages 65 to 68, inclusive, filed its motion in writing to amend, modify and correct the conclusions of law and judgment of Court in the respects named, the particular question presented by such motion being to include in the judgment the ten and sixteen per cent. penalties respectively chargeable under the statutes of the State of Indiana against all parties taxed who failed to pay the installments of their taxes as they fall due. This motion was overruled by the trial Court, and the Court by its conclusions of law and its action in overruling the motion to modify, refused to include in the judgment the general penalties exacted by law of all persons of whatever character or description, and this refusal is the probable explanation of the action of the plaintiffs in error and their learned counsel, to which attention will be directed later, in applying for a writ of error directly to the trial Court instead of appealing to the Supreme Court of the State and obtaining the writ of error to the Supreme Court, if necessary, instead of to the lower Court.

I.

HAS THIS COURT JURISDICTION TO REVIEW, ON WRIT OF ERROR, THE JUDGMENT OF AN INFERIOR COURT OF THE STATE, IT NOT BEING A COURT OF LAST RESORT?

Upon the rendition of these judgments, no appeal was taken by the plaintiffs in error, or

either of them, from the judgment to the Supreme Court of the State, but in lieu thereof application was made to and granted by one of the Associate Justices of this Court for a writ of error to the Circuit Court of Marion County, Indiana—not at all to the Supreme Court of the State. This Court is, therefore, in the outset confronted with a jurisdictional question, one underlying all the questions sought to be presented upon this record, and one that must be disposed of before either or any of the other questions sought to be presented by the record can be considered. Ordinarily this question is presented by a formal motion to dismiss, but we are of the opinion that where, as here, jurisdiction is sought to be conferred *invitum* over one of the States of the Union. The record must affirmatively show that this Court has jurisdiction, and where it appears, as we insist that it does here, that the record affirmatively shows that it can have under the acts of Congress no jurisdiction over this case, the objection may be taken in the brief and on the oral argument that without the interposition of a formal motion to dismiss for lack of jurisdiction.

It will be seen at once upon an inspection of the record that these were actions by the State acting not at all in its contractual, but in its sovereign capacity to enforce from the defendants by the processes of the courts, their proportionate contribution to the revenues of the State exacted by the levy and assessment of taxes which were unpaid and delinquent.

This action was had pursuant to authority contained in Section 11 of the act of March 6th, 1893, Section 8488 of the R. S. of 1894, and is in harmony with the course approved by this Court *in re* Debs, Petitioner, 158 U. S. 564, viz.: An appeal by a sovereign in a proper case to the courts for relief notwithstanding the fact that it may under other laws have another and more summary remedy for the enforcement of its rights.

The judgment of the Circuit Court was, so far as that court was concerned, final; but the Circuit Court was not in any sense the highest court of the State in which a decision in a suit could be had. The statute of the State governing such judgments is as follows:

"Appeals may be taken from the Circuit Courts and Superior Courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars: *Provided, however*, That this exception shall not apply to prohibit an appeal in cases originating before a justice of the peace or mayor of a city, involving the validity of an ordinance passed by an incorporated town or city. The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon."

§644 Burns' Rev. of 1894, Vol. 1, p. 236.

Section 647 authorized either of the plaintiffs in error in this case to take an appeal from the judgment against it without any reference whatever to the judgment that had been rendered against the other parties. Revision of 1894, §647, p. 238.

By Section 644, above quoted, the plaintiffs in error had the absolute right, depending upon no discretion whatever, either of the trial court or of either or any of the judges of the Supreme Court, to pray and perfect an appeal from the judgment of the Marion Circuit Court, in which the correctness of the action of the court below could and would be re-examined by the Supreme Court on appeal. It is not improbable that upon such an appeal the Supreme Court might have considered that the record in question presented a case to which they might properly apply the rule —the law of the case—and for that reason affirm the judgment, declining to reconsider its previous ruling, especially in view of the fact that while the case was originally pending before the Supreme Court the then appellees, the plaintiffs in error here, had not seen fit to avail themselves of the right (an absolute and not a discretionary one) to file a petition for rehearing, and upon the theory that where the plaintiffs in error had not seen fit to avail themselves of this right at a time when it belonged to them, they would not, upon the second appeal, consider questions that they might well have considered upon a petition for rehearing upon the first appeal. It was and is nevertheless true, however, that under the section of the statute quoted, and to which there is no exception whatever in the practice act in Indiana other than as contained in the language of the statute itself, there was the absolute right to appeal to the Supreme Court from the very judg-

ments on account of which these writs of error had been granted, and therefore we insist the judgments questioned upon these writs of error are not such judgments as are covered by Section 709 of the Revised Statutes of the United States.

Section 11, of the act of 1893, R. S. 1894, Section 8488, provides a remedy to the State for the collection of taxes assessed against telegraph, telephone, sleeping-car, express companies and fast freight lines, either by an action in favor of the county brought by the Prosecuting Attorney, or by an action brought by the Attorney-General for a number of, or all of, the counties in the State in which the taxes are due and delinquent, and provides that in the judgments to be rendered in such cases an additional penalty of fifty per cent., by reason of the institution and maintenance of the suit, shall be included in the judgment. The act nowhere provides that this penalty shall take the place of the ten per cent. penalty, Section 8570 of the revision of 1894, in the event of the failure to pay the first installment of taxes when it falls due, and the additional six per cent. penalty in the event of the continued failure when the second installment of taxes become due and payable.

While the case was pending in the Supreme Court of the State upon appeal, there was no question whatever presented as to the right of the State to have included in the judgment the ten and six per cent. penalties thus provided for. The only penalty presented to, and considered by, the Supeme Court was the fifty per cent. penalty,

and, as will be seen from the opinion, the cause was remanded with instructions to include in the judgment this fifty per cent. penalty when the cause was redocketed and a motion filed to restate the conclusions of law, and it will be seen by an inspection of the record that the State insisted that the conclusions of law and the judgments should each include not only the fifty per cent. penalty, but also the ten and six per cent. penalties. This insistence was denied by the lower court, and no penalty was included in the judgments other than the fifty per cent. penalty, but the State, by proper exceptions, and bill of exceptions, reserved this question for the consideration of the Supreme Court in the event the case should ever again find its way to the Supreme Court. It was apparent to the learned counsel for the plaintiffs in error that if they should, instead of applying directly to this Court for a writ of error to the *nisi prius* court, apply to the Supreme Court, as we insist they must have done in order to give jurisdiction to this Court, upon the docketing of the appeal in the Supreme Court of Indiana, cross errors would be assigned by the defendant in error upon the action of the Court below in refusing to include in the judgments the ten and six per cent. penalties insisted upon by the State; and it is obvious that the course of applying for a writ of error to the trial Court, instead of appealing to the Supreme Court of the State and applying for a writ of error to that Court, was adopted by the learned counsel in the effort and in the

hope of thereby flanking the jurisdiction of the Supreme Court of Indiana and its rights to direct the judgment to include the additional penalties, and thus deprive the State of Indiana of this additional amount, which we insist ought to have been included in the judgments. We have yet to learn, however, that the jurisdiction of this Court can be properly used to flank a party litigant or to deprive the Supreme Court of the State of the right to rectify and relieve from the errors committed by the trial Court.

This Court has, and can have, no jurisdiction whatever to revise, review, reverse or modify the decision of the courts of the State, where the State itself is a party to the record, unless it can be found in some positive provision of the statute conferring that jurisdiction, and the only authority for such jurisdiction is contained in Section 709 R. S. of the U. S., the language of which is as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * may be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error."
>
> Desty, 8 Ed., Vol. 1, p. 508.

We are not now insisting that the record does not show that an immunity had been claimed under the Constitution of the United States, and that the decision was against the immunity claimed. We are simply claiming that the Circuit Court of Marion County, Indiana, is not such a court as is covered by this section and included

in the description "in the highest court of a State in which a decision in the suit could be had," for the reason that by express statute of the State a decision in a case could be had upon appeal to the Supreme Court of the State, and this brings us to a consideration of the different cases where the right was claimed to a writ of error in State courts that were not the last tribunals to which resort could be had.

In *Miller* v. *Joseph et al.*, 17 Wallace 655, the writ of error had been issued to the Supreme Court of Appeals of Virginia. It appeared that a judgment had been rendered in the Circuit Court of Rockingham County, Virginia, for a sum less than five hundred dollars. The defendant applied to the Supreme Court of Appeals of the State to allow an appeal from the decree of the Circuit Court, but that Court refused to allow the appeal. Miller then sued out a writ of error to review the action of the Supreme Court of Appeals. It appeared that with certain exceptions, not embraced in the present case, the Constitution of Virginia did not allow an appeal to the Supreme Court of Appeals in civil cases where the amount in controversy was less than five hundred dollars. The writ was dismissed, this Court saying that as the Court of Appeals had no jurisdiction to review the decree of the Circuit Court, it had rightfully refused to allow the appeal because of the smallness of the amount in controversy. Under such circumstances the Circuit Court was the highest tribunal in which a decision of the case could be

had, and if a writ of error was allowable at all, it should have been issued to the Circuit Court and not to the Court of Appeals.

In *Fisher* v. *Perkins*, 122 U. S. 522, a writ of error was sued out to the Superior Court of the State of Kentucky, for a review of a judgment of that Court. The record showed a suit by *Perkins* v. *Fisher* in the Circuit Court of Daviess County, and a judgment for Fisher. This judgment was reversed by the Court of Appeals of the State, and the cause remanded for further proceedings. When the case was returned to the Circuit Court, additional pleadings were filed and a trial had, resulting in a judgment in favor of Perkins for less than one thousand dollars. From this judgment Fisher appealed to the Court of Appeals. Before the appeal was decided, the Superior Court of the State was organized and the case transferred to that Court for decision. The act of Kentucky (Section 5) conferred upon the Court of Appeals appellate jurisdiction over the final orders and judgment of the Superior Court in all cases except "(1) those for fines or for the recovery of money or personal property where the amount of the fine, or the value in controversy, is less than one thousand dollars, exclusive of interest and costs; (2) those where the judgment of the lower Court had been affirmed by the Superior Court without a dissenting vote."

But the act further provided that if in any case coming within these exceptions two of the judges should certify that the question involved is novel

and of sufficient importance, the party against whom the decision was rendered should be entitled to take the same by appeal to the Court of Appeals. The judgment of the Circuit Court was affirmed by the Superior Court without a dissenting vote, and writ of error was sued out from the Supreme Court of the United States to review that judgment without any application having previously been made to the Superior Court for the allowance of an appeal. So that it affirmatively appeared that the case was within both of the exceptions named in Section 5, to wit: The amount of the recovery was less than one thousand dollars, and the judgment had been affirmed by the Superior Court without a dissenting vote. In the opinion by Mr. Chief Justice Waite, at page 525, it is said:

"This Court has no power to review any other judgments or the courts of a State than those of the highest court 'in which a decision in the suit could be had.' Section 709 R. S. The Court of Appeals is the highest court of the State of Kentucky, and, consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court we are not authorized to review the judgment of the Superior Court. Although the value in controversy is less than one thousand dollars, and the judgment of the inferior court was affirmed by the Superior Court without a dissenting vote, an appeal did lie to the Court of Appeals if two of the judges of the Superior Court certified that, in their opinion, the question involved was novel and of sufficient importance. * * * * It is true that in this particular case the prayer for an appeal could not have been granted unless the necessary certificate was given [a certificate by two of the judges of the Superior Court that the question involved was novel and of sufficient importance], but if given it would have

been as much the duty of the Court to make the order of allowance as it would if the value in controversy had exceeded one thousand dollars, or the judgment of affirmance had been with a dissenting vote. Such a certificate enters into and forms part of the allowance of an appeal in a case like this, and an application for the allowance necessarily includes an application for the certificate unless it has been obtained before, because the certificate is one of the ingredients of an allowance. The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused, its absence furnishes no ground for a writ of error from this Court."

And the motion to dismiss was granted.

In *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, the plaintiff, the Great Western Telegraph Company, instituted an action in the Circuit Court of Milwaukee County to which a demurrer was filed by the defendant and overruled, and an appeal was taken upon this ruling to the Supreme Court of Wisconsin. The Supreme Court, reversing the decision of the court below, held that the demurrer should be sustained, and the cause was "remanded to the said Circuit Court for such further proceedings therein as may be according to law." Upon the cause being remanded to the inferior court the plaintiff refused to amend the complaint, insisting that it stated a sufficient cause of action, and stood upon his complaint. Thereupon the lower court, as directed, sustained the demurrer upon the ground "that the complaint does not state facts sufficient to constitute a cause of action, because it does not appear upon the face of said complaint that a valid or legal assessment was made upon the stockholders, and that the said

assessment appears by the said complaint to be unequal and unjust," and entered final judgment for the defendant.

Other than this, under the decree of the Supreme Court of Wisconsin, the lower court could not have done. It was simply following the mandate of the Supreme Court. Thereupon the plaintiff sued out the writ of error, and this Court said, at page 341:

"This Court has no jurisdiction, upon writ of error, to review a judgment of a State Court, unless it was a final judgment, by the highest Court of the State in which a decision in the suit could be had, and against a right set up under the Constitution or laws of the United States."

And at p. 342:

"The subsequent judgment of the inferior court, sustaining the demurrer and dismissing the action, can not be reviewed by this Court; because, a though that was a final judgment against the plaintiff in error, setting up a right under the Constitution and laws of the United States, it was not a final judgment in the highest court of the State in which a decision in the suit could be had."

And at p. 343:

"It is true that the Supreme Court of Wisconsin, upon a second appeal from an inferior Court, has always declined to reconsider any question of law decided upon the first appeal. (Citing cases.) It does not, however, as appears by the two cases last cited, when that question is the only one presented by the second appeal, dismiss that appeal for want of jurisdiction; but it entertains jurisdiction, and affirms the judgment. In so doing, that Court has done no more than this Court has always done, or than is necessary to enable an Appellate Court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were

to be litigated anew in the same case, upon any and every subsequent appeal."

And at p. 345:

"In the case at bar, as in *McComb* v. *Knox County Commissioners*, above cited, the final judgment of the inferior Court of the State may have been the necessary result of the previous decision by the Supreme Court of the question presented for its determination; but it was none the less, on that account, a judgment of the inferior Court. As such, it was, when rendered, open to review by the Supreme Court upon a new appeal; and, for that reason, was not the final judgment of the highest Court of the State in which a decision in the suit could be had."

Upon these authorities we submit that "this Court has no power to review any other judgments of the courts of the State than those of the highest courts in which a decision of the suit could be had;" that the Circuit Court of Marion County is not "the highest Court of the State of Indiana in which a decision in a suit could be had," and that, therefore, this Court is without jurisdiction to determine the writ of error, and that it should be dismissed.

II.

IS THE ACT OF MARCH 6, 1893, SO FAR AS IT PROVIDES FOR THE ASSESSMENT FOR TAXATION OF THE PROPERTIES OF EXPRESS COMPANIES, IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES IN THE RESPECTS CLAIMED?

The act of March 6, 1893, is an evolution in legislation. As far back as 1858 the State of Indiana had made provision for the assessment for taxation of railroad property substantially as unit

property. The legislation on the subject of taxation had been rather in the nature of piece-meal legislation until the passage of the act of December 21, 1872, (Acts of '72, p. 57), which embraced a general system of taxation for all property in the State. Under Sections 71 to 85, 284, 291 and 292, provision was made for assessing railroad properties substantially in harmony with the act of 1891, except that the State Board of Equalization was composed of different officers from the State Board of Tax Commissioners, and had somewhat less jurisdiction and authority conferred upon it, especially with reference to hearing appeals.

Under this act the assessment of telegraph companies, Sections 84, 85 and 292 was made substantially in the same manner as that of railroad companies, while that of express or transportation companies, Section 28, was provided for by lists, and was assessed as other properties in the localities where it was located.

In 1881 (Acts of 1881, p. 611) the system of taxation was to some extent modified, the sections governing the assessment of railroad properties being Sections 92 to 103, inclusive, p. 641, and Sections 138, 139 and 141, pp. 659 and 660.

In the meantime telephone companies had come into existence and under this law substantially similar provisions were made for the assessment of express, telegraph, telephone and sleeping-car companies, Sections 84 to 87, inclusive, pp. 636 to 640, by which taxation was provided upon the basis of a report of receipts to be made to the

Auditor of State and the taxes levied upon such gross receipts. These provisions in regard to express, telegraph, telephone and sleeping-car companies were carried into the next provision for taxation passed in 1891, and constitute Sections 68 to 71, inclusive, of that act, pp. 222 to 226. Under that act the State Board of Equalization was discontinued and in its stead provision was made for the State Board of Tax Commissioners, and to it was committed the duty of assessing railroad property, and the law in that respect has been very fully and completely considered by this Court in the cases of *P., C., C. & St. L. R'y Co.* v. *Backus*, and the *C., C., C. & St. L. R'y Co.* v. *Backus*, 154 U. S. 421 and 439.

At this time no substantial change was made in the method of taxation of express, telegraph, telephone and sleeping-car companies. Following the enactment of this law, a large number of suits were instituted by railroad companies denying its validity, none of which, however, except the two cases named, and that of the *Indianapolis & Vincennes R. R. Co.* v. *Backus*, 154 U. S. 438, found their way into this Court. These three cases were decided by the Supreme Court of the State of Indiana, the first on the 3d of February, 1893, at a time when the General Assembly of the State was in the midst of its biennial session. Meanwhile this Court had rendered the decisions on the Illinois railroad tax law, in 92 U. S. 575; the Kentucky tax law, in 115 U. S. 321; the Massachusetts telegraph law, in 125 U. S. 530; 141 U. S. 40; the

Pennsylvania sleeping-car law, in 141 U. S. 18, and the Kansas sleeping-car law, 141 U. S. 36.

It seemed from these cases that the principles governing the assessment and taxation of properties having a unity of operation, ownership and existence had been fully considered and precisely settled by this Court, the only Court that, under the Constitution had the right to finally decide all the federal questions involved, and by the decision in the Backus cases the questions arising under the State Constitution had, in like manner, been fully considered and determined by the Supreme Court of the State, and so the attention of the General Assembly, then in session, being thereby called to the proper principles that should govern in such legislation, took up the question of the assessment for taxation of telegraph, telephone, sleeping-car and express company properties and enacted the law of March 6, 1893.

> Acts of 1893, pp. 374 to 383, Burns' Annotated Revision of 1894, §§ 8478 to 8488, Vol. III, pp. 779 to 786, inclusive.

Certain sections of this act applying to the assessment of telegraph companies are set forth at length in the note at pages 2 to 5 of 163 U. S., in connection with the decision in the case of the *Western Union Co.* v. *Taggart et al.*, in which the constitutionality of the act so far as it affects telegraph companies was questioned.

Of the act in question, Section 1 applies to telegraph, 2 to telephone, 3 to express companies, and

4 to sleeping-car companies, with especial reference to the forms of the reports to be made by said companies respectively. Sections 5 to 9, inclusive, provide for the duties of the Auditor of State with respect to the laying of the reports before the State Board of Tax Commissioners and the action to be taken by said Board. Sections 9 and 10 then provide for the steps to be taken by the Auditor of State and the Auditors of the counties, respectively, in regard to extending the taxes upon the duplicates, and Section 11 makes provision for the collection of such taxes.

a. By the Auditor of the particular county in the event of the taxes of that county remaining unpaid.

b. By the Attorney-General in the event that the taxes remain unpaid in more than one county, in which event the Attorney-General is authorized to maintain an action against the companies to whom taxes have been assessed in all or any number of counties in which the taxes remain unpaid and delinquent.

For the more convenient reference to this law by this Court, we file a copy of the act of 1893 as an appendix to this brief.

The opinion of the Supreme Court of Indiana upon the question of the validity of the taxes assessed against these companies is found in the record at pages 54 to 60, inclusive, and as reported in 42 N. E. 483.

In the writs of error, transcript pp. 71, 72 and 73, the following language is used:

"Wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority, exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission, held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission."

But this really presents no specific question as tendered by the record, but is simply a showing for the issuing of the writs.

Turning to the notice for the purpose of abridging the record on pages 78 and 79, the statement is made that—

"The plaintiffs in error assign for error that the tax assessments * * * * * are in contravention of the following provisions of the Constitution of the United States, to wit: That part of Article I, Section 8, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States; Article IV, Section 2, which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and Article XIV, Section 2, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law nor deny the persons within its jurisdiction the equal protection of the laws, for the reason that said assessments are not made against the plaintiffs in error in respect of any property belonging to them in the State of Indiana, or subject to the taxing power of said State, or upon the basis of the value of any such property, as property, but are

really an attempt to enforce against the plaintiffs in error the payment of a tax for the privilege of carrying on their business in the State of Indiana, which is largely interstate commerce."

That is to say, it contravenes—

a. Article I, Section 8, the power of Congress to regulate commerce.

b. Article IV, Section 2, conferring upon the citizens of each State all the privileges of citizens in the several States.

c. Section 2, of the fourteenth amendment, prohibiting any State from abridging the privileges or immunities of citizens of the United States; (2) depriving persons of property without due process of law; (3) denying to persons within its jurisdiction the equal protection of the laws, because the assessments are not made in respect of any property belonging to the plaintiffs in error in Indiana, or subject to the taxing power of said State or upon the basis of the value of such property as property, but are really an attempt to enforce against them the payment of a tax for the privilege of carrying on their business, which is largely interstate commerce, in the State of Indiana.

It is difficult to so analyze this assignment of error as anything other than an assignment—and this is in harmony with the first paragraph of answer: that the act of March 6th, 1893, is alleged to be in contravention of the Constitution of the United States in that it was a burden upon interstate commerce, as it imposed a tax for the privi lege of carrying on interstate commerce.

It is perhaps easier to get at the pith of the charge in this assignment of errors by the process of exclusion than otherwise.

1. It alleges no fraud, so that the question of the amount of the assessment becomes immaterial.

2. In the allegation of the absence of due process of law, there is no specification or particulars named showing such absence, and the decisions by this Court in the Backus cases, cited *supra*, show that the process of law was due: that there was a tribunal afforded and an opportunity to be heard.

3. In the allegation of the denial of the equal protection of the laws, no particular is shown in which there was any such denial. The law is a general one, and covers all persons, whether citizens of this or other States, whether natural or artificial persons, who are engaged in this or any similar business.

4. In the allegation that it does not confer upon citizens of each State all the privileges conferred in the several States, the charge is meaningless, for the law is the same whether the citizens engaged in the business are citizens of Ohio, New York, Massachusetts or Indiana.

5. It abridges no privileges or immunities of the citizens of the United States, for it simply provides for the taxation of property by whomsoever owned or operated.

In any way in which the charge may be looked at, it resolves itself into the averment that the act

in question is in violation of the Constitution of the United States, for the reason that:

a. It authorizes an assessment of property not within, and, consequently, not subject to the taxing power of the State of Indiana.

b. That it is a tax upon interstate commerce.

DID THE ACT OF MARCH 6, 1893, AUTHORIZE OR PERMIT THE ASSESSMENT OF PROPERTY NOT WITHIN AND CONSEQUENTLY NOT SUBJECT TO THE JURISDICTION OF THE STATE OF INDIANA?

We submit that the language of the assignment of error contained in this notice, which is the only assignment of error in the record, is not sufficient to bring in question the five questions above stated, but that by reason of the language following the general language "for the reason that said assessments are not made, etc.," limits and restricts the assignment of errors to the two latter reasons above given, and we insist that those are the only questions that are properly presented by the record, even if this Court, notwithstanding the suggestion made, *supra*, has jurisdiction upon this record to determine any question other than the question of lack of jurisdiction.

It is entirely certain, from the record, that the courts of the State of Indiana, whether *nisi prius* or appellate, did not construe the action of the Board or the statute of the State as authorizing or permitting the levying or assessment of a tax upon interstate commerce.

The records of the State Board of Tax Commissioners are not embodied in the transcript filed in this Court. Indeed, sedulous effort would seem to be made to conceal from the Court the contents of the record upon which the decision was made in the court below, and which was submitted to the Supreme Court upon appeal. It appears, as stated, *supra*, affirmatively, that while the record submitted to the Supreme Court embodied the evidence taken before the trial court the plaintiffs in error were unwilling, or at any rate did not see fit, to furnish this Court with that evidence.

Sec. 3 of the act of March 6, 1893, Sec. 8480 of the Revision of 1894, requires all express companies between the first of April and the first of June to deliver to the Auditor of State a statement showing the facts required to be shown by the section.

As shown by the records in the office of the Auditor of State, which are themselves public records, and also as shown by the bill of exceptions containing the evidence heard upon the trial and certified to the Supreme Court of the State, as shown at page 54 of the transcript, the American Express Company had made its statement, showing its number of shares at 180,000 for the year 1893, and the value per share of $116, making a total share value of $20,880,000; that the total mileage was 43,154; and that the total mileage within the State of Indiana was 1,832. If this property, therefore, had been apportioned to the State of Indiana on a strict mileage basis, that would give

the value of the property within the State $886,-410, whereas, the property was assessed, including local assessments, at $477,055, only 53.82 per cent. of such total value. And if the proportion of value in Indiana was accepted as the value beyond the State, it follows, therefore, that in assessing the value within the State there was deducted from the total property of $20,880,000 the sum of $10,-091,500 before apportioning the value of the State of Indiana upon the mileage basis.

In the case of the Adams Express Company the number of shares was reported at 120,000 for the same year, the value per share being $150, making the total share value $18,000,000; the total mileage 32,000, and the total mileage within the State of Indiana, 2,158. Thus placing the total value of the property within the State of Indiana, on a mileage basis at $1,211,375, whereas its assessed value, including local assessments, was $567,172, or a percentage of the assessed to the mileage value of 46.81 per cent., and if the proportion of value in Indiana was accepted as the same as elsewhere, there was deducted from the total values before assessing upon the mileage basis $10,000,-000.

And, for the same year, the United States Express Company reported its number of shares at 10,000, and the value per share at $55, making a total share value of $5,500,000, with a total mileage of 22,326 miles, and a total mileage within the State of 1,068 miles, making a total value of property within the State on a mileage basis $263,100,

whereas the assessed value was only $197,961.75, making the percentage assessed to mileage value 75.28 per cent., showing that if the proportion of value in Indiana was accepted as the same as elsewhere, there was deducted from the total value before assessing on the mileage basis $1,190,037.

The showing for the year 1894 was not materially different from that for the year 1893, and we do not deem it necessary to encumber the record with the details for that year. We deem it important to call the attention of the Court to this showing because of the contention that was made below, and will, we may assume, be made here, that the record shows affirmatively that the assessment of property in Indiana was made strictly on a mileage basis and that, therefore, the assessment necessarily included property beyond the limits of the State.

The act of 1893, in terms, requires the State Board to deduct from any apportionment or valuation the real estate situate beyond the limits of the State not used as a part of the express company's property in transportation.

The question of the duty of the State Board of Tax Commissioners with respect to ascertaining the value of the property within the State of Indiana was more fully presented in the case of the *Western Union Telegraph Co.* v. *Taggart et al.*, 141 Ind. 281, than in this case. Indeed, upon the appeal to the Supreme Court of the State in this case, that precise question was not in terms argued. The construction by the highest Court of the State

of a statute is a part of that statute, and we, therefore, at this point, call the attention of the Supreme Court to the language of the Supreme Court of Indiana upon that point. At pages 296 to 300 of the case in 141 Ind., it was said:

"But counsel contend most earnestly that the act of 1893, in applying the mileage basis of valuation to appellant's lines of telegraph, compels the State Board of Tax Commissioners to add large outside values to the values of the Indiana portions of the lines, for the reason, as claimed, that the extra State parts of appellant's property are proportionately of greater value than the parts within the State. In this counsel do not interpret the law correctly. The act, it is true, provides a method of valuation—the mileage method—as a basis for the taxation of certain property within the State of Indiana. But this is simply a means of determining the true cash value of the property within the State; and if in the case of appellant's property, or in any other case it is shown to the Board, or is discovered by them, that still further deduction should be made, on account of larger proportional values outside of the State, or for any other reason, then the Board must make such deductions, so that, finally, only the property within the State of Indiana shall be assessed, and that at its true cash value.

"As said already, and as appears from the title and from Section 12 of the body of the act of 1893, p 382, here in review, that statute is 'supplementary to and amendatory of' the general tax law of 1891, and must therefore be construed in connection therewith. By the act of 1893, Sections 68, 69, 70 and 71 of the act of 1891, for which the act of 1893 was substituted, 'and all other laws and parts of laws in conflict with this act' were expressly repealed. The express repeal of those sections left all the other sections of the act of 1891 in full force, showing that it was not the intent of the Legislature to abridge or change in any respect the duties and powers of the State Board as fixed by the act of 1891. Neither is the ultimate basis of taxation, as there fixed, changed by the act of 1893. The cardinal rule remains that it is the property within the State not expressly ex-

empt from taxation, and that alone, which is to be assessed, and that at its true cash value. By Section 3 of this act of 1891, p. 199, 'all property within the jurisdiction of this State not expressly exempted, shall be subject to taxation.' Authority is given to tax no other property. By Sections 33, 48, 53, 60, 74, 90, 95, 97, 102, 105, 112, 114, 129, 130, 137, and perhaps other sections, all assessing officers, from the Township Assessor to the State Board of Tax Commissioners, are required and bound by their oaths of office to assess all property at its 'true cash value.' By Section 120, p. 252, it is made the particular duty of the State Board, among other things, 'to see that all assessments of property in this State are made according to law.' By Section 129, p 252, it is provided that 'the State Board of Tax Commissioners is hereby given all the powers given to County Boards of Review. They shall not be bound by any reports or estimates of value of railroad property, real estate, or other property, as returned to the County Auditors or to the Auditor of State, but shall appraise and assess all property at its true cash value, as defined by this act, according to their best knowledge and judgment and so as to equalize the assessment of property throughout the State.' And, by Section 130, each member of the Board is required to declare as a part of his oath of office: 'I will in no case assess any property at more or less than its true cash value.' Interpreting the act of 1893 in the light of the foregoing provision of the act of 1891, as we must, we can have no difficulty in concluding, as we do, that in the act of 1893 the Legislature provided the mileage method as the basis for the assessment of telegraph and other like property, both as to lines situated partly within and partly without this State, and also as to lines running through several counties or other subdivisions of the State, but that it was not the intention of the Legislature, nor is it the meaning of that act, that any property outside of the State should be assessed by importation of values or otherwise, or that any property should be assessed at more or less than its true cash value. Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the State Board has deducted from the total valuation of all interstate property such values, if any, of

extra State property, as will leave the remaining property within and without the State, as near as may be, of equal proportional value.

"The possibility of such exceptional cases in the assessment of railroad property is referred to in *Railroad Co.* v. *Backus*, 154 U. S. 431, 14 Sup. Ct. 1114. 'As, for instance, where the terminal facilities in some large city are of enormous value and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business, requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the State Board, it must be assumed, in the absence of anything to the contrary, that such Board, in making the assessment, took into account the peculiar and large value of such facilities and such extra rolling stock.' So, in this case, the act of 1893 provides generally for a mode of ascertaining the true cash value of that part of interstate telegraph and other property which is within the State of Indiana, to wit: the mileage method. But, should there be particular cases where that method must be modified in order to reach the necessary result, viz.: the true cash value of such part of the property as is within the jurisdiction of the State; the law of 1893 itself supplies the means of doing so. In Section 6, p. 379, of the act, after speaking of the reports and schedules filed with the Auditor, and by him laid before the Board, it is said that the Board shall proceed to assess the property according to the mileage method, 'after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, co-partnership or corporation to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses in case they shall deem it necessary to ascertain the true cash value of such property.

"Were it true, as counsel for appellant contend, that the act of 1893 provides an iron-clad mode of assessment by which the

Board is required to import and assess valuations of property outside the State, there would be no need of any further information than that given by the schedules filed in the first instance. The fact that other information is provided for, and agents of the companies and other witnesses may be called, shows that the intention was, as expressly provided in the general tax law of 1891, that the Board should assess only property within the jurisdiction of the State, and that only at its true cash value."

From this it appears that the duty of the State Board of Tax Commissioners, *quoad* the assessment of telegraph companies, (and it applies in the same manner and to the same extent to express companies) is (after taking into consideration the total value of the properties owned by the companies, and the proportionate mileage in the State of Indiana, as compared with the mileage generally elsewhere) to ascertain, determine and assess the true cash value of such property within the State of Indiana as a part of the entire unit, and thus having ascertained the value of the entire property within the State, apportion such value between the several counties upon the basis that the mileage of the routes in each of the counties in the State bears to the total mileage in the State, giving to each particular county the benefit of the several properties in that county. In other words:

1. To apply the unit rule absolutely to the value within the State in the apportionment between the counties; and

2. To take into consideration, in connection with the act of ascertaining the value of the property within the State, the fact that the property to

be assessed was a part of an entire unit property, and that a certain proportion of that unit property was situate within the State, but that no assessment should be made other than of the value of the property that was within the State.

Great stress was laid by the plaintiffs in error in the trial court and in the Supreme Court of the State upon the fact that the route of an express company was an intangible, non-assessable thing. To use the favorite expression of counsel, "a mere chalk line," which was not the subject of taxation, and it was insisted that for that reason the unit rule so universally applied by this Court was not applicable to the assessment of express companies, and that if applied it necessarily meant the assessment:

a. Of property beyond the jurisdiction of the State of Indiana, or

b. Of interstate commerce, or both.

And to support this contention, numerous citations were made and dwelt upon from the original opinion by Judge Taft, from which, upon fuller consideration, he receded, and various dissenting opinions by the Justices of this court in various cases, and we presume that the same course will, or at least may, be adopted here.

At the time of preparing this brief we have not been favored with a brief on behalf of the plaintiffs in error.

While it is true that any language emanating from so distinguished a jurist as Mr. Justice Bradley, for example, upon a question of law,

whether dropping casually from his lips, delivered in a law lecture, or contained in a dissenting opinion, is entitled to very great consideration, it is nevertheless true that ordinarily the rule of law is established by the prevailing opinion of the Court rather than by the dissenting opinion. Counsel for plaintiffs in error also dwelt with great pleasure and confidence upon a sentence taken from the opinion of Mr. Justice Lamar in *Pacific Express Company* v. *Seibert*, 142 U. S. at 354:

> "Express companies such as are defined by this act have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted."

The language of a Judge in the decision of a particular case depends largely upon the facts and questions arising in that case. As was said by Mr. Chief Justice Coffey, of the Supreme Court of Indiana, in *The State ex rel.* v. *Hyde*, 129 Ind. at p. 306:

> "The argument of the Judge who writes an opinion is never to be confounded with the principle of law decided by the Court."

In the particular case in which Mr. Justice Lamar announced the opinion of the Court to the effect that the tax law of the State of Missouri assessing taxes against particular express companies by levying a tax upon the gross receipts was constitutional, he used this language for the purpose of showing that the tax question in that case

was neither unjust nor unconstitutional. There was there no question of the ascertaining by any tribunal of the value of any property of an express company within the State, nor of considering at all whether the property of an express company could be said to be a unit property, such as that of a railroad, telegraph, telephone, or sleeping-car company. Language should be construed with reference to its context and the various facts, principles and questions concerning which it is used. An isolated excerpt from a discourse or opinion not infrequently leaves an erroneous impression, and might be understood to sustain a contention which was not at all under consideration at the time, and this is clearly the case with the language used by Mr. Justice Lamar. It might well be true that in the particular cases alluded to there might have been no property whatever owned in the State of Missouri by the Pacific Express Company, and yet, having an existence in the State, and doing business, it was the right of the State to exact some contribution for the protection that was afforded, and the best method of doing that might well by the legislative authority of Missouri be considered to be the method of a tax upon the gross receipts arising in the carrying on of business within the State, in which case undoubtedly the language used would be borne out by the fact and eminently proper.

The theory of the legislation of Indiana, however, is different. The revenues derived from express companies, by taking into consideration their

gross receipts, were insignificant. Whether because it was so difficult to distinguish or ascertain what the truth was when express companies claimed, as such companies always do when taxes are sought to be exacted, that the receipts derived from the local business were but a mere bagatelle, and, with unimportant exceptions, the entire receipts were from interstate commerce, that the General Assembly concluded to establish a different system of taxation and placed express companies in the same category as railroad companies, telegraph, telephone and sleeping-car companies, a class in which they unquestionably belong, is not a matter for consideration in this brief.

In what manner a State shall determine to provide for the assessment and collection of taxes is a matter of legislation and not at all of judicial investigation, except in so far as it may be claimed that the method adopted violates some constitutional requirement, and the only question that is presented by the record in this case is not whether the State of Indiana might have adopted a better system, whether it is equally as satisfactory to the taxpayers as some other system that might be adopted, but whether the system that was adopted is open to the objection of unconstitutionality, and upon that question we submit that it is quite late for the objection that the system adopted is the unit system. That has been so frequently considered by this Court, and so uniformly upheld, that it would seem that it hardly needs defense.

In the Illinois Railroad Tax Cases, 92 U. S. at p. 608, it was said by Mr. Justice Miller:

"But, as we have already said, a railroad must be regarded for many, indeed, for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy, by any means, a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. * * * * * It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole." * * * * *

And at page 611:

"But the contention is that the rule of treating the road, its rolling stock and franchises as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits violates the principles of this section. (Section 10 of the Constitution of Illinois.) We have already discussed this question and are of the opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property.

"This Court has expressly held in two cases, where the road of a corporation ran through different States that a tax upon the income or franchise of the road as properly apportioned by taking the whole income or value of the franchise and the length of the road within each State as the basis of taxation."

And by the same Justice, in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. at p. 552:

"The tax in the present case, although nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property."

In *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S., the statement of the case at pp. 19 and 20 shows that it was an action brought by the State of Pennsylvania against Pullman's Palace Car Co. to recover the amount of a tax on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in that and other States over which its cars were run, and that the Court below held:

"That the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used; and, therefore, gave judgment for the State."

In that case it was said by Mr. Justice Gray, at p. 26:

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which

it should be taxed in that State was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles in that and other States over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran the company would be assessed upon the whole value of its capital stock and no more.

"The validity of this mode of apportioning such a tax is sustained by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case and was not limited, as upon writs of error to the State Courts, to questions under the Constitution and laws of the United States."

And in *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S., it was said by Mr. Justice Gray, at pp. 43 and 44:

"The effect of the statutes complained of is that every telegraph company, whether incorporated in Massachusetts or elsewhere, owning a line of telegraph in Massachusetts, is to be there taxed on such proportion only of the whole value of its capital stock as the length of its line in Massachusetts bears to the whole length of its lines elsewhere, and to prevent its whole tax from amounting in any event to more than that, it is provided that from the taxable portion of the value of its capital so ascertained shall be deducted the value of any property owned by it in Massachusetts which is subject to local taxation in the cities and towns. Such being the real state of the case, all the objections to the validity of the tax are met and disposed of by the decisions of this Court in the former case between these parties."

And at page 45, after quoting with approbation the language used by Mr. Justice Miller, in 125 U. S., quotes the following:

"The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State, and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries on which the tax should be assessed is not an unfair or an unjust one, and the details of the method by which this was determined have not exceeded the fair range of legislative discretion."

In *Columbus Southern Railway* v. *Wright*, 151 U. S. 479, Mr. Justice Jackson quotes with approbation from the Supreme Court of Tennessee:

"The property of a railroad company for purposes of taxation consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, viz.: the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit not confined to any one county in which it may be exercised. The principal part of the franchise is the right to charge for freight and passengers, the charge being limited within a prescribed or reasonable rate for carriage in the proportion of the distance of transportation. Obviously, after ascertaining the value of the entire franchise in the State as a unit, no more approximate or just division of this value can be made for purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of track in the county to the entire length of road in the State. And this is what was done by the acts under consideration. The choses in action of a corporation, its rolling stock and personal property, according to the principles of the common law, have their *situs* at the domicile or place of business of the company. (Citing authorities.) But the Legislature may change the *situs* of such property for purposes of taxation. (Citing authorities.) The rolling stock of a corporation, used in transporting passengers and freight over any and all parts of its line of road can not be said to have a *situs* which would give a preference to any county through

which the road may run over any other county in like situation. The choses in action of a railroad company, created by the exercise of its franchises, on every part of its track, may be equally said to be without a *situs* so as to give a preference. The Legislature might well treat them as the franchise itself, for, or by, the exercise of which they are created, and proportion the general valuation among the counties through which the road may run, according to the length of road in each county. The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road and the bars and crossties thereon. The value of the roadway, at any given time, is not the original cost, nor *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value can not be determined by ascertaining the value of the land included in the roadway, assessed at the market price of adjacent lands, and adding the value of the crossties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings, in connection with its capital stock. No local estimate of the fraction in one county of a railroad track, running through several counties, can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

And then added, at p. 481:

"The principle set out in the above quoted authorities is clearly sanctioned by this Court in the State Railroad Tax Cases, 92 U. S. 575, 607, where the same objection to the system of taxation by the State, as here presented, was made that the rolling stock, etc., was personal property, and that it and other personal property had a situs at the principal place of business of the corporation, and could be taxed in no other county but the one where it was situated."

In the Indiana Railway Tax Cases, in 154 U. S., it was said by Mr. Justice Brewer, at p. 430:

"When a road runs through two States it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two States is ascertained, the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the State Board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road, which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this Court several times as eminently fair."

And at pp. 444 to 447:

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values, plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. * * * * Now when a road runs into two States, each State is entitled to consider as within its territorial jurisdiction, and subject to the burdens of its taxes what may, perhaps, not inaccurately be described as a proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the State were operated separately. Take the case of a

railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana, and partly to that in Ohio, and each State has an equal right to reach after a just proportion of that value and subject it to the taxing processes. The question is, how can equity be secured between the States, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the State."

In the Indiana Railway Tax Cases, which was affirmed in the opinion just quoted from, the Supreme Court of Indiana in 133 Ind. at pp. 654–5, uses the following language:

"It is evident that no fair or equitable value could be placed on a railroad track by severing it into parts extending from one township or county line to another, or even from one State line to another, and estimating only the portions lying within the borders of a single township, county or State, independently of its connection beyond such lines, or by considering the cost of constructing any such division. Nor could the value of an engine or car, or other property coming within the class of property denominated in the act under consideration as rolling stock be determined by considering the purpose for which it was used in any State or subdivision of a State, or the cost of construction of the same, and to limit the right of the State to tax rolling stock which might, at the date of assessment, be found within the State or subdivision of the State, would be, in effect, to release such property from taxation. A railroad is valuable as a whole, and every section of the line going to make up the whole is essential The portion of the track crossing unreclaimed land of practically no value is as valuable as that portion which runs through a populous city, in so far as its purpose and use is that of an interstate line, for without either the connection would be broken, and its use destroyed for that purpose. The value of such portion is increased by reason of its connection."

And at p. 656:

"The Court, in the case last cited, expressly recognizes the legality of an assessment on rolling stock valued in accordance with the rule of treating the road as a unit and taking such a proportion of its value as the length of the road lying within the State bears to the whole road, for if an apprais-ment and assessment of a railroad, including in such valuation its rolling stock and franchises, can be assessed, certainly its rolling stock can be valued and assessed separately in the same manner, for values would not be imported in the one method more than the other. The Court, in the same case, discusses and sustains the same method of assessing the railroad track, and says. 'It may well be doubted whether any better mode of determining the value has been devised.'"

In the *Western Union Telegraph Co.* v. *Taggart*, afterward affirmed upon writ of error by this Court in 163 U. S., it was said by Judge Howard, after quoting the language of this Court in the Indiana Railway Tax Cases, at pp. 294–5 of 141 Ind.:

"All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate telegraph property. It is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole, and by reason of its several connections, and not by virtue of any part taken by itself; no way, therefore, by which the value of the lines in this State can be determined, seems so just and equitable as to take that proportion of the whole value which the mileage in this State bears to the whole mileage"

This latter decision was re-examined by this Court upon writ of error in *Western Union Tele-*

graph Co. v. *Taggart et al.*, 163 U. S. 1, and the validity of the law and the assessment was upheld. Mr. Justice Gray, after calling attention to the various cases that we have heretofore cited, used the following language at page 18:

"Those decisions clearly establish that a statute of a State requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery, subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing (that) than the system of taxation adopted is oppressive and unconstitutional."

And at page 24:

"This Court further held that the question of the cash valuation of the company's property was a question of fact, the determination of which was committed to the State Board of Tax Commissioners; and that the decision of the Board could not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined."

These decisions, we submit, are conclusive of the question presented by this record, unless this Court can say judicially that, with respect to the unity of ownership, operation and existence, there is a radical difference between railroads, telegraph and sleeping-car companies on the one side and express companies on the other in that respect. That there is some difference is clear. A railroad

company owns ties and rails: an express company does not. A telegraph company owns poles and wires; an express company does not. A sleeping-car company owns sleeping-cars, furniture and bedding; an express company does not. But we submit that all these differences are immaterial and non-essential when it comes to determining the question whether there is a difference between the unity. The connection of railroad companies and telegraph companies is a physical one by means of the railroad track in the one and the telegraph wires and poles in the other. In a sleeping-car company there is no physical connection as in railroads and telegraph companies. The connection there is a legal one, growing out of the operation of its sleeping-cars under contracts with the railroad companies over which the cars are run. It was never said or supposed, in determining the right to assess sleeping-car companies, that there was an actual physical connected line of sleeping-cars continuously running over the State either of Pennsylvania or of Kansas. The operation, while uniform and regular, was not continuous and did not constitute a physical line. In that respect the situation of the express companies is in entire harmony with, and similar to, the situation of sleeping-car companies, and is legally identical with that of railroad and telegraph companies.

By finding 2, p. 48 of the record, it appears that the Adams Express Company—

"By proper contracts made with the Pennsylvania Company, the Chicago, St. Louis & Pittsburgh Railway Company, and the

Pittsburgh, Chicago & St. Louis Railway Company, had at and prior to the 1st day of April, 1893, and ever since, the exclusive right to transport express matter over the lines known as the Pennsylvania Company line within the State of Indiana. The American Express Company, under similar contracts, had the exclusive right to transport express matter over the line of the Louisville, New Albany & Chicago Railway Company, and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company within the State of Indiana, and the United States Express Company had, under similar contracts, the exclusive right of carrying express matter over the lines of the Lake Erie & Western and other railroads in the State of Indiana."

By Finding 4, *Ib.*, that the defendant had made reports as required by the act of 1893, showing the capital, the manner in which divided, par and market value, and the real estate, fixtures, property and appliances owned by each, and subject to local taxation within the State, and the location and assessed value thereof in each county in the State, and showing also the total length of the lines over which such association transported merchandise, etc., and the total length of the line and routes within and without the State, within each of the counties within the State.

By Finding 5, p. 49, that upon the meeting of the State Board these statements were laid by the Auditor before the Board, and that they thereupon proceeded to and did assess the said defendants, and each of them; and said Board did ascertain the number of miles of the several associations in each of the counties of the State through, into or across which each of them, or either, operated their route. The result of such examination being to find and assess against the Adams and American Express Companies each, at the rate of $250 per mile, and of the United States Express Company at the rate of $175 per mile. The total amount in each of the counties being omitted by direction of the plaintiff in error.

By Finding 7, p. 50, it appears that upon the completion of the assessment the result was certified by the Auditor of State to the Auditors of the several counties, by whom the amounts certified were apportioned among the townships

And by Finding 8, p. 50, the amount of the taxes due in each of the counties was ascertained, the particulars of which, however, are omitted by the direction of the plaintiffs in error.

By Finding 9, p. 51, the aggregate amount due from each of the companies for taxes was ascertained.

This Court knows judicially that the P., C., C. & St. L., the Pennsylvania Company's lines, the C., C., C. & St. L., the L., N. A. & C. and the L. E. & W. Railroad Company's lines extend into or across other States beside the State of Indiana, so that independent of the language in the findings with reference to the statements that were filed, and the statements that were as heretofore suggested, omitted from the record by the acts of the plaintiff in error, the Court knows that these defendants were engaged under these contracts in carrying express matter generally throughout the country. This constituted legal unity, and unity in fact in ownership in existence and in operation, and it seems to us idle to claim that the unit rule does not apply to express companies in fact and in law as well as to sleeping-car, telegraph and railroad companies. It is not a question, we submit, of the assessment of a particular horse or a particular wagon, or a particular safe, or a particular car leased for the purpose of carrying on business that gives value to the property of an express company or ascertains what such property is worth. The use that property is put to is an important element in the determination of its value. An express wagon stranded in a swamp and not used, and in a situation where it could not be used, a

car either owned or leased but having no right to pass over a railroad line would be comparatively insignificant in value, but a system of wagons and carrying appliances in all the cities of the country, great and small (where the business of the company would justify the maintenance of an office and the ownership or leasing of carrying appliances), would be of very great value, and the value is dependent not so much upon any particular horse or wagon but upon the whole system, the unit, just as the value of a strip of telegraph wire or a strip of railroad track might be infinitesimal if disconnected with any other line of telegraph wire or any other line of railroad track, but as a connecting link, as a part of the complete whole, the value would be very great.

As suggested in the language of Mr. Justice Brewer, which we do not deem necessary to repeat at this point, it is this use and the manner in which it might be, and is, used which constitutes the great element of value in the property itself, and until, and unless, it can be pointed out to the satisfaction of this Court that the ownership and operation of express company properties is distinguishable from the ownership and operation of railroad, telegraph and sleeping-car properties, we insist that the unit rule is as properly applicable to the one as to the other.

III.

IS A TAX UPON THE MEANS AND APPLIANCES USED IN THE CARRYING ON OF STATE AND INTERSTATE TRAFFIC A REGULATION OF INTERSTATE COMMERCE IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES?

The claim that such an assessment constitutes an imposition upon interstate commerce for the reason that the property owned is principally engaged in interstate commerce, has so frequently been presented and insisted upon in this Court, and so consistently and persistently repudiated by it, that it seems that it hardly needs discussion. Although the property in question may be used principally or exclusively in the transportation of interstate commerce, that does not result in exempting the property from taxation.

In *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S., it was said by Mr. Justice Gray, at page 23:

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

And by Mr. Justice Brewer in the Indiana Railway Tax Cases, 154 U. S. p. 447:

"The second question must also be answered in the negative. It has been, again and again, said by this Court that while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce.

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put. In the nature of things, it is practically impossible—at least in respect to railroad property [and the same rule would apply *totidem verbis* to express company property]—to divide its value and determine how much is caused by one use to which it is put, and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And, because of this fact, it is something which an assessing board is not required to attempt. * * * * * It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by State laws, and the rule of all property taxation is the rule of value, and, by that rule, property engaged in interstate commerce is controlled the same as property engaged in commerce within the State. Neither is this an attempt to do by indirection what can not be done directly; that is, to cast a burden on interstate commerce."

There is no place to which the State of Indiana might apply for an authoritative exposition of the requirements of the Constitution of the United States except the decisions of this high Court. Its legislators, if they happen to be learned in the law, might have their opinion as to what the

Constitution of the United States permits and what it forbids. Its Executive, if he happens to have the necessary legal attainments, might have his opinion. Its law officers might assist the legislators in arriving at a just and proper determination upon that question. But when this Court has spoken, all other courts and all other authorities must bend and bow to the conclusions so announced. The State of Indiana, having ascertained, from the decisions cited *supra*, the lines and limitations of legislation affecting taxation as announced by this Court, moulded its legislation in conformity to and in harmony therewith, and that legislation so moulded is now the subject of this attack.

We submit that that legislation is exactly and identically upon the lines so authoritatively announced and determined, and that therefore no one should be heard to gainsay the validity of that legislation.

Respectfully submitted,

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Of Counsel.

APPENDIX.

AN ACT supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70 and 71 of said act and all laws in conflict therewith, and declaring an emergency.

[APPROVED MARCH 6, 1893.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* That any joint stock association, company, copartnership or corporation, whether incorporated under the laws of this State or of any other State, or of any foreign nation, engaged in transmitting to, from, through, in or across the State of Indiana, telegraphic messages, shall be deemed and held to be a telegraph company, and every such telegraph company shall, annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof, in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana,

and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used and the sum at which the same is assessed for taxation in the locality where situated.

Seventh All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company.

(*b*) The total length of so much of their lines as is outside the State of Indiana.

(*c*) The length of the lines within each of the counties and townships within the State of Indiana.

SEC. 2. Every telephone company doing business in this State, whether incorporated under the laws of this State, or of any other State, or of any foreign nation, shall annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said asssociation, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company.

(*b*) The total length of so much of their lines as is outside the State of Indiana.

(*c*) The length of the lines within each of the counties and townships within the State of Indiana.

SEC. 3. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other State, or any foreign nation engaged in conveying to, from, through, in or across this State, or any part thereof, money, packages, gold, silver, plate, merchandise, freight or other articles, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, provided such joint stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement with reference to the first day of April next preceding, showing:

First. The total capital stock or capital of said association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share, and, in case no shares of capital stock are issued, in what manner the capital thereof is divided and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of the said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State of Indiana, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by said association, company, copartnership or corporation, situate outside the State of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight or express matter.

(*b*) The total length of such lines or routes as are outside the State of Indiana.

(*c*) The length of such lines or routes within each of the counties and townships within the State of Indiana.

SEC. 4. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other State, or of any foreign nation, and conveying to, from, through, in or across this State, or any part thereof, passengers or travelers in palace cars, drawing-room cars, sleeping cars, dining cars or chair cars, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this act; and every such sleeping-car company doing business in this State shall, annually, between the first day of April and the first day of June, make out and deliver to the Auditor of State a statement, verified by the oath of the officers or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specified real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the franchises and amounts thereof.

Eighth. (a) The total length of the main lines of all the railroad companies over which said cars are run.

(*b*) The total length of so much of the main lines of the railroad companies over which said cars are run as is outside the State of Indiana.

(*c*) The length of the lines of said railroad companies over which said cars are run within each of the counties and townships within the State of Indiana: *Provided*, That where the railroads, over which said lines run, have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but a single track, and in case the Auditor of State shall require it, such statement shall show in detail the number of miles of each or any particular railroad system or division.

SEC. 5. Upon the filing of such statements the Auditor of State shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make

such other and further statements as said Auditor of State may call for. In case of the failure or refusal of any association, company, copartnership or corporation to make out and deliver to the Auditor of State any statement or statements required by this act, such association, company, copartnership or corporation shall forfeit and pay to the State of Indiana one hundred ($100) dollars for each additional day such report is delayed beyond the first day of June, to be sued and recovered in any proper form of action in the name of the State of Indiana on the relation of the Auditor of State, and such penalty, when collected, shall be paid into the general fund of the State.

SEC. 6. Upon the meeting of the State Board of Tax Commissioners for the purpose of assessing railroad and other property, said Auditor of State shall lay such statements, with such information as may have been furnished him, before said Board of Tax Commissioners, who shall thereupon value and assess the property of each association, company, copartnership or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership or corporation to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to ascertain the true cash value of such property.

SEC. 7. Said State Board of Tax Commissioners shall first ascertain the true cash value of the entire property owned by said association, company, copartnership or corporation from said statements or otherwise, for that purpose, taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: *Provided, however,* That in case the whole, or any portion of the property of such association, company, copartnership or corpo-

ration shall be incumbered by a mortgage or mortgages, such Board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership or corporation. Such Board of Tax Commissioners shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the State of Indiana and not specifically used in the general business of such associations, companies, copartnerships or corporations, which said assessed values for taxation shall be by said Board deducted from the gross value of the property as above ascertained. Said State Board of Tax Commissioners shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships or corporations within the State of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships or corporations, as above ascertained, after deducting the assessed value of such real estate without the State, which the lengths of the lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies within the State of Indiana, bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining or chair car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the State, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes, within the State of Indiana, bears to the whole length of the lines or routes of such associations, companies, copartnerships or corporations, and such amount, so ascertained, shall be deemed and held as the entire value of the property of said associations, companies, copartner-

ships or corporations within the State of Indiana. From the entire value of the property within the State so ascertained, there shall be deducted, by said Board, the assessed value for taxation of all the real estate, structures, machinery and appliances within the State and subject to local taxation in the counties and townships, as hereinbefore described in Item No. 5 of sections 1, 2, 3 and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said Board assessed to said association.

SEC. 8. Said State Board of Tax Commissioners shall thereupon ascertain the value per mile of the property within the State by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the State by the number of miles within the State, and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership or corporation within the State of Indiana.

SEC. 9. Said State Board of Tax Commissioners shall thereupon for the purpose of determining what amount shall be assessed by it to said association, company, copartnership or corporation in each county in the State, through, across, into or over which the line of said association, company, copartnership or corporation extends, multiply the value per mile as above ascertained by the number of miles in each of such counties as reported in said statements, or as otherwise ascertained, and the result thereof shall be by said Board certified to the Auditor of State, who shall thereupon certify the same to the Auditors respectively of the several counties through, into, over or across which the lines or routes of said association, company, copartnership or corporation extend, and such Auditors shall apportion the amount certified for their counties respectively among the several townships into, through, over or across which such lines or routes extend in proportion to the length of the lines in such townships.

SEC. 10. To enable said County Auditors to properly apportion the assessments between the several townships, they are authorized to require the agent of said association or company to

report to them respectively, under oath, the length of the lines in each township, and the Auditor shall thereupon add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures and appliances situated in any township, and extend the taxes thereon upon the duplicates as in other cases.

SEC. 11. In case any such association, copartnership or corporation as named in this supplemental and amendatory act shall fail or refuse to pay any taxes assessed against it in any county or township in the State, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the State of Indiana by the Prosecuting Attorneys of the different judicial circuits of the State, on the relation of the Auditors of the different counties of this State, and the judgment in said action shall include a penalty of fifty per cent. of the amount of taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, copartnership, company or corporation shall extend, or in any county where such association, company, copartnership or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said State Board of Tax Commissioners, or in case such association, company, copartnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the Attorney-General may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits, shall be by said Auditor of State accounted for as a credit to the respective counties for or on account of which such collections were made by said Auditor of State, at

the next ensuing settlement with such county, but the penalty so collected shall be credited to the General Fund of the State; and upon such settlement being made, the Treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the State, and proper entries shall be made with reference thereto: *Provided, however*, That in any such action the amount of the assessment fixed by said State Board of Tax Commissioners and apportioned to such county, or apportioned by the County Auditor to any particular township, shall not be controverted.

SEC. 12. Inasmuch as the provisions of this act are intended to take the place of sections 68, 69, 70 and 71 of the act entitled "An act concerning taxation, repealing all laws in conflict therewith and declaring an emergency," approved March 6, 1891, such sections and each of them and all other laws and parts of laws in conflict with this act are hereby repealed: *Provided*, That all moneys now due the State, or which may become due on the 1st day of April, 1893, or at any other time, on account of any assessment or charge made against any of the joint stock associations, persons, companies or corporations on account of per cent. on gross or net earnings for the preceding year or years, and all penalties and charges thereon growing out of any failure to make reports on payments as now required by the provisions of the aforesaid repealed sections shall be paid and collected under the provisions of said repealed sections the same as if said sections were not repealed, and any suit brought for the recovery of such money, taxes or penalties shall be begun under the provisions of said repealed sections and prosecuted to final judgment thereunder in all respects the same as if said sections were continued in full force; and it is hereby expressly provided that all the rights of the State accrued, or which may accrue on the 1st day of April, 1893, on account of receipts for the preceding years, are hereby saved from the operation of the aforesaid repealing clause.

SEC. 13. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

165-255

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
THE STATE OF INDIANA,
Defendant in Error.

Case No.—
Term No. 649.

PETITION FOR ADVANCEMENT.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
THE STATE OF INDIANA,
Defendant in Error.
Case No.—
Term No.

PETITION FOR ADVANCEMENT.

The said State of Indiana shows the Court that it is the defendant in error in the above entitled cause, and that the execution of the revenue laws of the State of Indiana is enjoined and stayed by virtue of the pendency of the writ of error herein, and that by reason thereof the State is prevented from collecting from said plaintiff in error the taxes due to the defendant in error under the judgments rendered in the Court below.

And said petitioner further shows the Court that there are now pending in this Court the following entitled causes, to wit:

The American Express Co., plaintiff in error, *v.* The State of Indiana, defendant in error. Term No. 469.

The Adams Express Co., plaintiff in error, *v.* The State of Indiana, defendant in error. Term No. 470.

The United States Express Co., plaintiff in error, *v.* The State of Indiana, defendant in error. Term No. 471; and

The Western Union Telegraph Co., plaintiff in error, *v.* Americus C. Daily, defendant in error. Term No. 448.

That all of said causes have been advanced and set for hearing by this Court on the first Monday in December, 1896, following the cases set for hearing on that day. That each and every of said cases, and the case herein, arise under and question the validity of the act of March 6, 1893, touching the assessment for taxation of telegraph, telephone, sleeping-car and express companies, and while the single question presented in this case, to wit, the right of the State to exact the penalty provided for in Section 11 of said act, is not necessarily involved in either of the other cases, its determination is so closely allied and connected with the others that all of said cases can be advantageously heard together, and that it will subserve the convenience of this Court and also of

the counsel engaged in said causes, that this cause should be advanced and set down for argument at the same time or immediately following the time set for the hearing of the above-enumerated causes, so that all of the cases now pending in this court, involving the constitutionality of the said act of March 6, 1893, may be argued and determined at the same time.

Wherefore said petitioner prays an order advancing said cause, and setting the same down for hearing, in common with the other causes above-named or immediately following them, and for such other and further orders in the premises as may to the Court seem just and meet.

WILLIAM A. KETCHAM,
Attorney-General of Indiana.

ALONZO GREENE SMITH,
LEON O. BAILEY,
MERRILL MOORES,
Of Counsel.